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HAROLD B. WILLEY, Clerk

No. 488

IN THE

Supreme Court of the United States

October Term, 1955

In the Matter of the Application on Behalf of Max Lieben Enke and Karen Jean Enke for a Writ of Habeas Corpus

STEPHEN ENKE, *Petitioner,*

v.

JEAN S. BAUCUS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provision and Statutes Involved	3
Statement	4
Reasons for Allowance of the Writ	10
Conclusion	16
Appendix.	
Opinion of Associate Justices Davis, Angstman and Anderson	1a
Judgment of Supreme Court of Montana	13a
Opinion of Chief Justice Adair and Associate Justice Bottomly	14a

CITATIONS

CASES:

Esenwein v. Esenwein, 325 U. S. 279	12
Estin v. Estin, 334 U. S. 541	13
Haddock v. Haddock, 201 U. S. 562	13
Halvey v. Halvey, 330 U. S. 610	10, 14
Maloney v. Maloney, 67 C. A. 2d. 278, 154 P. 2d. 426	10
Marts v. Marts, 15 C. A. 2d. 224, 59 P. 2d. 170	10
May v. Anderson, 345 U. S. 528	10, 13, 14
Sampsell v. Superior Court, 32 Cal. 2d. 763, 197 P. 2d. 739	8
Treinies v. Sunshine Mining Co., 308 U. S. 66	14
Williams v. North Carolina, 317 U. S. 287	13
Williams v. North Carolina, 325 U. S. 226	12

STATUTES:

28 U.S.C. 1257 (3)	2
28 U.S.C. 1738	3
California Civil Code, Sec. 138	10
U. S. Constitution, Art. IV, Sec. 1	3, 7

MISCELLANEOUS:

Wolfson and Kurland, *Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States* (1951) 7, 15

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STEPHEN ENKE, *Petitioner,*

v.

JEAN S. BAUCUS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above matter July 27, 1955, Chief Justice Adair and Associate Justice Bottomly dissenting.

CITATION TO OPINIONS BELOW

The opinions below (App. 1a, 14a) are not yet reported in the official State reports. They are reported at 287 P. 2d. 19.

JURISDICTION

The judgment of the Supreme Court of the State of Montana denying petitioner's petition for writ of habeas corpus, was filed July 27, 1955. (App. 1a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). In accordance with Rule 23 (1) (b) the manner in which the federal question was expressly disposed of by the highest court of the State of Montana is set out in the Statement (infra, pp. 6 et seq.).

QUESTION PRESENTED

Respondent-mother, petitioner-father and their two children resided and were domiciled in the State of California. Respondent initiated divorce proceedings in a California Court, was awarded custody of the children, and thereafter moved with the children to Montana. Under California law the California Court retained continuing jurisdiction to modify the custody decree. Petitioner subsequently sought in the California Court a modification of the custody decree. Respondent was served in Montana with notice of the modification proceedings, appeared generally in the proceedings through counsel, submitted evidence, and otherwise contested the modification on the merits. The California Court entered an order modifying its original decree to give custody to petitioner one month each year. Respondent did not appeal. Respondent de-

[1] The judgment appears at the foot of the majority opinion. (App. 13a-14a). The Supreme Court of Montana does not issue separate judgments.

clined to relinquish custody. Petitioner instituted *habeas corpus* proceedings in the Supreme Court of Montana.

The question is whether, consistently with the Full Faith and Credit Clause of the Constitution of the United States, and without itself considering any issue concerning the welfare of the children, the Supreme Court of the State of Montana could decline to give effect to the modification decree of the California Court on the sole ground that the children were not domiciled within the jurisdiction of the California Court at the time of the modification proceedings.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Full Faith and Credit Clause of the Constitution of the United States (Art. IV, § 1) provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

28 U. S. C. § 1738 (Act of June 25, 1948, c. 646, 62 Stat. 947, as developed from the Act of May 26, 1790, 1 Stat. 122), after providing for the authentication of the Acts of the legislature, and of the records and judicial proceedings of any court, of any State of the United States, provides in part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

STATEMENT

Except where otherwise indicated, the following statement of the case is taken from the opinion of the majority of the Supreme Court of the State of Montana in these proceedings. (App. 2a-5a).

The petitioner and respondent were married in Helena, Montana, in 1940, and moved immediately to Los Angeles, California. Two children, the subjects of this proceeding, were born to the marriage. Petitioner, respondent and the two children were domiciled in California until, and at the time of, the separation and divorce in the summer of 1944.

The separation occurred in April, 1944. Petitioner and respondent entered into a separation agreement which, in view of the extreme youth of the children, then 2½ years and 3½ months old, vested their sole custody in respondent, with visitation rights in the petitioner. The agreement recited the fact that respondent would take the children to Montana, and reside with them there "at least in the immediate future." Respondent then filed suit for divorce in the Superior Court of Los Angeles County, California. Petitioner defaulted, and on May 18, the Superior Court entered an interlocutory judgment of divorce. The decree made provision for custody and visitation rights which were in accordance with the separation agreement, including respondent's right to determine the residence of the children.

Upon entry of the interlocutory decree, respondent took up residence with the children in Montana. In the following year, on May 18, 1945, the Superior Court entered a final judgment of divorce which was duly filed at the request of respondent's counsel (R. 25).

This final decree incorporated by reference the provisions of the interlocutory decree as to the custody of the children.

In October, 1954, petitioner, who had remained a resident and domiciliary of California, applied to the Superior Court of Los Angeles County to modify the custody provisions of the May 18, 1945 decree, by granting custody of the children to petitioner for a period of one month each year. Respondent received actual notice of the modification proceedings by service upon her in Montana. Respondent made a general appearance in the modification proceedings through her attorney. Through her attorney she participated in the hearing held in the proceedings; she submitted affidavits (R. 8-16, 18-23) which asserted the fact that the residence of the children was in Montana, but which opposed the proposed modification only on the ground that it would be contrary to the welfare of the children and was not justified by any change in circumstances occurring subsequent to the custody order of May 18, 1945. Respondent's attorney cross-examined petitioner and his witnesses, and otherwise opposed the modification on the merits. Neither respondent nor the children appeared at the hearing physically, and the children were not separately served.

Based upon the evidence received in these contested proceedings the Superior Court, through its Commissioner, made detailed findings of fact (R. 27-28), the principal ones of which were that both petitioner and respondent were fit and proper persons to have the custody of minor children; that petitioner's visits with the children under the visitation provision of the decree of May 18, 1945, had not been satisfactory to either petitioner or the children; that the best interests

of the children required that they have the opportunity to know their father; and that a material change of circumstances had occurred since the entry of the original custody decree in that the children were no longer infants. On November 23, 1954, the Commissioner recommended, and the Court ordered, that defendant be given physical custody of the children for the month of July each year, beginning July, 1955. The modification order was endorsed upon the face of the interlocutory judgment of May 18, 1944 (R. 25). Respondent took no appeal.

When July, 1955 arrived respondent declined to yield temporary custody of the children to petitioner in accordance with the modification order. On July 2, petitioner applied to the Supreme Court of Montana for a writ of *habeas corpus,* supporting the petition with duly authenticated copies of the modified interlocutory order of the Supreme Court of California dated May 18, 1944 (R. 25), its final judgment of May 21, 1945 (R. 26), and the findings of fact and order of that court entered November 23, 1954 (R. 27-28), plus other pertinent material. The writ issued, the respondent moved to quash and pled to the merits, petitioner's traverse was made, and the matter was submitted on briefs and oral argument. On July 27 the Supreme Court of Montana, by a 3 to 2 majority, rendered judgment discharging the writ and remanding the children to the custody of respondent, the Chief Justice and Associate Justice Bottomly dissenting (App. 13a-14a).

Presentation and Decision of the Federal Question— The sole issue tendered by petitioner to the Supreme Court of Montana was the entitlement of the modification decree of the California court to enforcement

under the Full Faith and Credit Clause of the Constitution of the United States. In her Return to the Writ (R. 51-53) and in the proceedings which followed, respondent also asked the Supreme Court of Montana to make an independent determination as to whether the change in circumstances after the rendition of the interlocutory order of the California Court, required modification in the custody provisions of that decree.

Since the federal question upon which petitioner relies was expressly considered and decided by the majority of the Supreme Court of Montana in its opinion, the inquiry as to whether the jurisdictional requirements in this Court with respect to the raising of the federal question are satisfied, will be limited to an examination of that opinion.[2]

The majority of the Supreme Court of Montana held that the November 23, 1954 modification order of the Superior Court of Los Angeles was not entitled to full faith and credit under the Article IV, Section 1, of the Constitution, because in the absence of domicile of the children within the jurisdiction of the California court, that court lacked jurisdiction. Although either formulation raises a federal question of substance, it is clear that the Montana court held that absence of domiciliary control over the children at the time of the entry of the modification decree deprived the California court of power to enter a decree entitled to extra-territorial effect under the Full Faith and Credit Clause, irrespective of whether the California court possessed jurisdiction under California law to enter a judgment binding within that State.

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[2] Wolfson and Kurland, *Robertson and Kirkham's, Jurisdiction of the Supreme Court of the United States,* § 83, pp. 143-145.

The Montana court determined that the children had acquired a domicile in Montana. The Montana court noted that three views existed among the States with respect to jurisdiction in child custody cases: that jurisdiction is based on *in personam* jurisdiction over the parents; that it rests with the courts of the State within which the child is domiciled; or that jurisdiction requires the physical presence of the child. These formulations, of course, relate to conflict of laws jurisdiction. Although stating that it appeared from the opinion in *Sampsell* v. *Superior Court,* 32 Cal. 2d. 763, 197 P. 2d. 739 that California "leans toward" the theory limiting jurisdiction to the State of the child's domicile, the majority of the justices of the Montana court concluded that "Whether we are right or wrong" regarding what the California Court would hold, the principle vesting jurisdiction to control custody of children exclusively in the State of domicile was the rule which the Montana court adopted in the decision of the present case. The opinion of the Montana Court then examined other authorities bearing on the problem, none of which were drawn from or related to the law of California with respect to the jurisdiction of its courts in custody cases.

Clearly speaking of Full Faith and Credit jurisdiction, rather than domestic jurisdiction, the Montana Court stated that it was not sufficient that the parents be personally before the Court: (App. 10a-11a)

> The *res* must also be there, or jurisdiction fails. That *res* is made up of the rights and obligations which the phrase "custody of a minor" connotes, and by almost universal agreement among courts and legal scholars today is inseparable from the domicil of the minor himself. Where then the minor's domicil is not within the jurisdiction at

> the time, as are the facts at bar, the *res* likewise is not within the jurisdiction. The courts may not proceed even with both parents before it ...

The continuing jurisdiction of the California court was likewise disposed of, not on the ground that such jurisdiction did not exist under California law with respect to California judgment, but rather on the ground that such jurisdiction was ineffective as a basis for extra-territorial application of a California judgment where the domicile of the children had changed after entry of the final decree of divorce and was not within the sister State at the time of the modification, at least where the children's removal was by consent and not in the nature of a deliberate flight to avoid the original custody decree. Again, the authorities cited and distinguished by the Montana Court relate to conflict of law jurisdiction and are not California decisions concerning the continuing jurisdiction of the California Court in domestic matters.

The majority of the Montana Court then stated: (App. 13a)

> It follows then that the order of the California Court of November 23, 1954, does not come within the protection of the full faith and credit clause of the Constitution of the United States (U. S. Const., Art. IV, § 1), because it was made without jurisdiction. (Citing[3]). It will accordingly be given no effect in Montana.

The majority opinion concluded with the observation that the petitioner might institute a new custody proceeding in the appropriate Montana district court.

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[3] None of the cases cited were California cases; none related to the jurisdiction of California courts in the domestic sense.

The writ of *habeas corpus* was ordered discharged, and the children remanded to the custody of respondent.

The Montana Court took no action upon the respondent's request that it initiate independent modification proceedings.

Chief Justice Adair and Associate Justice Bottomly dissented. An extended opinion by the Chief Justice demonstrates, among other matters, that under California law the Superior Court of Los Angeles County possessed a continuing jurisdiction to modify the original custody decree which was not interrupted by the subsequent change in the children's domicile.[4]

REASONS FOR ALLOWANCE OF THE WRIT

This Court has repeatedly recognized that the State Court decisions presenting conflicts in the field of domestic relations law under the Full Faith and Credit Clause, are of certiorari importance. Specifically, the consideration which led to the allowance of the writ in *Halvey* v. *Halvey*, 330 U.S. 610, and *May* v. *Anderson*, 345 U.S. 528, to review questions concerning inter-State child custody obligations under the Clause are equally applicable to the present case. Indeed, the question presented in the instant case involves essentially the same basic problems as do two of the questions which were specifically reserved in the *Halvey*

[4] App. 14a-43a, particularly 17a-19a, 31a-33a, 36a-43a. The statute conferring continuing jurisdiction is Section 138 of California Civil Code. The California decision on all fours is *Marts* v. *Marts*, 15 C. A. 2d. 224, 59 P. 2d. 170, holding that jurisdiction to modify the provisions respecting custody in a final divorce decree continues despite departure of the child from the State with the consent of the Court after the entry of the final decree. See also *Maloney* v. *Maloney*, 67 C. A. 2d. 278, 154 P. 2d 426.

case, and which are thus of conceded substantiality and importance.[5] The question presented here has not been decided by this Court.

The implications of the decision of the Montana Court which make it important that the case be brought here, can be shortly demonstrated.

The Montana Court has held that a custody decree is not entitled to full faith and credit unless the child is domiciled within the State of rendition, even though (1) the decree in question is a modification of an original custody decree of the State of rendition which was based upon domicile of the children, of both parents, and of the marriage, (2) the law of the State of rendition expressly reserves a continuing jurisdiction to modify such custody decree, (3) the parent seeking the modification is a resident and domiciliary of the State of rendition, (4) the State of rendition obtains personal jurisdiction over the parent who is resisting the modification and who is the custodian of the child under the decree of State of rendition, (5) the need for modification in the interest of the welfare of the child and in view of a material change of circumstances is fully litigated on the merits by both parents in the court of the State of rendition, and the losing parent does not appeal; and (6) the State of the forum makes no determination of its own with respect to the welfare of the child.

The interests of the State of California in this dispute were substantial, not only because of her past relationship to the persons involved, to the marriage, and to the divorce, but also because of California's present interest in the father as its resident and domi-

[5] The first and last. 330 U. S. at 615-616.

ciliary. The interests of the State of Montana as the domicile of the mother and children were likewise real and important, had the Montana Court sought to act upon them. The decision of the Montana Court that California's decree was *ipso facto* void because the children were domiciled elsewhere, would seem simply to frustrate the efforts of California to effectuate its interests in the subject matter, without furthering those of Montana. Domicile is frequently in a State other than the State of residence; and separate domiciles for the child and at least one of the parents are common. It is important that this Court determine whether the rule adopted by Montana which resolves all full faith and credit problems in custody cases by reference solely to the child's domicile, is the proper solution to the problem under the full faith and credit clause, which this Court has treated as one of accomodating as fully as possible the conflicting interests of the States concerned. *Esenwein* v. *Esenwein,* 325 U.S. 279, 282; *Williams* v. *North Carolina,* 325 U.S. 226, 232.

The holding of the Montana Court that personal jurisdiction of both parents is insufficient to confer jurisdiction to render a decree binding under the Full Faith and Credit Clause upon those parents, even where the question of the welfare of the child is not involved, appears to be inconsistent with basic decisions of this Court under the Clause. It is one thing for Montana to say that jurisdiction of its Courts to modify their custody decrees should depend upon domicile of the children at the time of modification; but it is another to say that if California adopts a less strict rule its modification orders are not entitled to full faith and credit. There is no apparent reason why

California could not, consistently with due process, adopt the rule of jurisdiction which it did. The party sought to be bound had actual notice, and full opportunity to be heard, and took advantage of it. To hold under these circumstances that the judgment rendered is not binding upon the parties under the Clause is contrary to the reasoning of *Williams* v. *North Carolina*, 317 U.S. 287, 301-302. It looks back to the rigid and unworkable—and rejected—doctrine of *Haddock* v. *Haddock*, 201 U.S. 562, with the concept of exclusive jurisdiction at the domicile of the children serving the same frustrating function in custody cases as did the notion of exclusive jurisdiction at the matrimonial domicile in divorce cases. The implication of such decisions as *May* v. *Anderson*, 345 U.S. 528, 533, and *Estin* v. *Estin*, 334 U.S. 541, 548, is that personal jurisdiction over the parents, whose relationships to the children are the source of the rights and obligations at issue, should be enough to enable any State having jurisdiction over both parents to act with respect to the conflicting claims of those parents to custody, within the protection of the Full Faith and Credit Clause. The artificiality of the Montana rule is apparent where, as here, the oldest of the absent children was 13, and the parent having custody participated in the modification proceedings through counsel and strenuously contested the issue of the welfare of the children on the merits. In any event the issues presented by the apparent conflict with this Court's past decisions can only be resolved by this Court, the "final arbiter when the question is raised as to what is the permissible limitation on the full faith and credit clause" (*Williams* v. *North Carolina*, 317 U.S. 287, 302), and the question is patently of sufficient consequence to call for resolution here.

The ruling of the Montana court creates a situation in which petitioner must either abandon his efforts to secure a modification of the custody arrangement so as to give him custody of his children for one month a year, or must relitigate the proposed modification on the merits after having prevailed in a proper proceeding before a Court of general jurisdiction in which the merits were fully litigated and the jurisdictional issue was litigated or open to litigation. By declining to obey the litigated order entered by a competent Court with jurisdiction over her person, respondent avoids an order which she considers adverse and secures a second opportunity to try the identical issues. This result is patently at odds with the underlying purpose and policy of the Full Faith and Credit Clause to prevent "repetitive litigation", *Halvey* v. *Halvey,* 308 U.S. 610, 616. "One trial of an issue is enough." *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66, 78. The question of whether the exception to the policy of the Clause created by the rule of the Montana Court is truly justified, is a substantial and important one.

In the light of the rule of *May* v. *Anderson,* 345 U.S. 528, the decision of the Montana Court drastically limits the forums which can finally resolve this type of dispute. In the *May* case this Court held that domicile of the child within a State is not sufficient to empower the Courts of that State to cut off the rights of a parent by an *ex parte* custody decree. Under the ruling of the Montana Court that domicile of the child is essential to Full Faith and Credit jurisdiction, and that no State without it can render a generally valid custody decree even based upon *in personam* jurisdiction over both parents, only a State within which the child is domiciled *and* both parents can be found, can

settle a custody quarrel between contending parents. If the Montana decision is sound constitutional law it must inevitably follow that many of these disputes will never be resolved, even as to conditions affecting the welfare of the children existing at any particular time. The number of our divided families, and the general mobility of our people, make it important that this Court review the wisdom and necessity of this result.

As the Montana Court noted, (App. 6a) the Courts of other States have held that either physical presence of the children or *in personam* jurisdiction of the parents is the requisite basis for full faith and credit jurisdiction in child custody cases. A conflict among the highest State Courts in the resolution of an important federal question is thus presented—a valid ground for the granting of certiorari.[6]

A large majority of the States which have passed upon the problem, hold that their courts possess a continuing jurisdiction to modify custody decrees in the circumstances of the present case.[7] The ruling of the Montana Court that these modification orders are nonetheless unenforceable in other States will therefore lead to frequent non-recognition of such decrees with consequent re-litigation, contrary to the policy of the Clause and the interests of the children.

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[6] Wolfson and Kurland, *Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States*, § 371, pp. 738-740.

[7] The cases are collected in an exhaustive annotation at 4 A.L.R. 2d. 7. The pertinent cases are cited in Sections 17 through 23, pages 32 through 39, of the original annotation and supplements.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari to the Supreme Court of the State of Montana should be granted.

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APPENDIX

APPENDIX

APPENDIX

No. 9571

STATE of MONTANA.
In the Supreme Court, June Term, 1955.

IN THE MATTER OF THE APPLICATION
On Behalf Of
MAX SIEBEN ENKE and KAREN JEAN ENKE
FOR A WRIT OF HABEAS CORPUS.

CHARLES V. HUPPE, *Esq.*, and
LEO J. KOTTAS, *Esq.*,
Helena, Montana, argued orally for Petitioner.

EDMOND G. TOOMEY, *Esq.*, and
WILLIAM H. CLARKE, *Esq.*,
Helena, Montana, argued orally for Respondent.
Submitted: July 20, 1955.
Decided: July 27, 1955.

Filed: July 27, 1955.

FRANK MURRAY
Clerk.

Mr. Justice Davis delivered the Opinion of the Court.

Original proceeding by writ of habeas corpus to obtain the custody of two minor children.

On application of one Stephen Enke made July 2, 1955, a writ of habeas corpus issued out of this court directed to one Jean S. Baucus to inquire into the custody of Max Sieben Enke and Karen Jean Enke, the minor children of Stephen Enke and Jean S. Baucus, formerly Jean S. Enke. On July 6, 1955, in obedience to this writ the respondent,

Jean S. Baucus, made return thereto (1) by motion to quash, and (2) without prejudice to that motion by pleading on the merits. To this return a traverse has been made on the part of the petitioner. The matter has been argued orally and on briefs submitted by both the petitioner and the respondent. Submission has now been had for our opinion and judgment.

Hereafter we shall refer to the petitioner, Stephen Enke, as the father, to the respondent, Jean S. Baucus, as the mother.

The material facts we gather from the return and the traverse thereto and from the exhibits submitted at the hearing. They follow.

The mother, then Jean Sheriff, and the father, Stephen Enke, were married in 1940 at Helena, Montana. Subsequently their residence was at Los Angeles, California, where they made their home until May 18, 1944, or thereabouts. To this union there were born the two children who are the subjects of this proceeding. Up to May 18, 1944, or shortly thereafter, their domicil and that of each of their parents as well was in California.

There on April 29, 1944, the father and mother came to the parting of their ways. As of that date a settlement agreement containing this paragraph was executed by them, viz.,

"The parties are the parents of MAX SIEBEN ENKE, aged two and one-half years, and KAREN JEAN ENKE aged three and one-half months. The children are of tender years and husband recognizes that it is natural and proper that wife should have their custody and agrees that wife shall have the sole custody of said children and each of them. In making this agreement husband understands that it is the intention of wife to reside with the said children at least in the immediate future in the State of Montana and that she will take the children to Montana shortly

after the execution of this agreement. Husband shall have the right to correspond with the children and the right to visit them occasionally at the place of their residence at reasonable times and in reasonable manner after making arrangements with wife for such visits."

Subsequently the mother sued for divorce in the Superior Court of Los Angeles County, California, and thereafter on May 18, 1944, was granted by that court upon the default of the father an interlocutory judgment of divorce, in which there is found this decretal paragraph:

"IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff [Jean S. Enke] shall have the sole custody of the minor children MAX SIEBEN ENKE, aged 2 1/2 years, and KAREN JEAN ENKE, aged 3 1/2 months, and the right to determine their place of residence, and that Defendant [Stephen Enke] shall have the right to correspond with the said children, and the right to visit them occasionally at the place of their residence at reasonable times and in reasonable manner after making arrangements with Plaintiff for such visits, and this court reserves the right to make appropriate orders for the support of the children."

By the final judgment in this matter, entered on May 22, 1945, the provision here for the custody of these children was adopted, and thereby "made binding on the parties affected thereby."

Consistent with the settlement agreement of April 29, 1944, and the consent of the father given therein, and with the interlocutory judgment of May 18, 1944, the mother returned in May 1944 with her two children to Helena, Montana, where ever since she has made her home. There in 1947 she was married to one John Baucus, with whom she has since lived at Helena and on an adjacent ranch in Montana, as his wife, and with whom there since this marriage she has made a home for the children, Max and

Karen, and also for her son by her second marriage, John Frederick Baucus, born September 19, 1949.

About October 1, 1954, the father applied to the California Court at Los Angeles for a modification of the interlocutory decree of May 18, 1944, that he might have the custody of his children during July of each year. Notice of these proceedings was given the mother by service upon her at Helena in Montana. She responded by authorizing an attorney of her selection at Los Angeles to appear for her and resist the father's application. She also offered affidavits when that application was heard, which were received in evidence. Her attorney appeared at the hearing and, we shall assume, cross-examined the father and his witnesses on her behalf.

The mother herself did not in person attend this hearing. Neither of the children was in California at any time after May 1944. No notice or process designed to bring them before the California Court was given or served upon them so far as this record discloses. Neither appeared personally or otherwise at the hearing.

Specifically, neither of these children was in California at the time of the hearing, or when the order modifying the interlocutory decree was made November 23, 1954.

On that date, however, the California Court, proceeding under Cal. Civ. Code, § 138, modified its judgment of May 18, 1944, to provide:

"* * * The defendant may have the physical custody of the minor children for the month of July of each year, beginning July, 1955; the defendant is ordered to provide the necessary transportation to and from the home of the plaintiff. The plaintiff is restrained from registering the minor children in school or elsewhere in any name other than their natural surname of Enke. * * *."

Subsequently the father sought to have the children, Max and Karen, tured over to him on July 1, 1955. The mother refused to surrender them. This litigation followed.

In our consideration of this matter we are met first with the mother's motion to quash the writ issued and to dismiss these proceedings. In our view this motion is not well taken. It is accordingly denied.

No particular formality is required to frame a petition sufficient to warrant the issuance of the writ of habeas corpus. Nor are the proceedings themselves marked by adherence to form. State ex rel. Giroux v. Giroux, 19 Mont. 149, 155, 156, 47 P. 798; McDowell v. Gould, 166 Ga. 670, 144 S.E. 206; 39 C.J.S., Habeas Corpus, § 80, pp. 626, 627, § 82, p. 635; 29 C.J., Habeas Corpus, § 158, pp. 142, 143. Measured by the rule of these authorities we find the petition upon which the writ here issued sufficient and that R.C.M. 1947, § 94-101-2, is satisfied.

Moreover, when the writ has issued the function of the petition or application therefor is fulfilled. 39 C.J.S., Habeas Corpus, § 80, p. 629; 29 C.J., Habeas Corpus, § 158, p. 143. Thereafter the pleadings or papers before the court whereon the matter is heard are the return made to the writ, which serves the purpose of a complaint on the part of the respondent, and the traverse or other answer to that return tendered by the petitioner. On these papers the court has jurisdiction to proceed. In re Collins, 151 Cal. 340, 342, 90 P. 827, 91 P. 397, 129 Am. St. Rep. 122; State v. Olsen, 53 Idaho 546, 549, 26 P. 2d 127; 39 C.J.S., Habeas Corpus, § 88, pp. 651, 652; 25 Am. Jur., Habeas Corpus, § 124, pp. 235, 236. Without more then we turn directly to the merits.

There the question for decision is: Did the California Superior Court at Los Angeles have jurisdiction on November 23, 1954, to modify the interlocutory judgment of May 18, 1944, and accordingly give the custody of Max and Karen Enke to the father for the month of July of each year? We conclude, the California Court had no such jurisdiction, that its order of November 23, 1954, was therefore void.

To be specific: When in May 1944 these children were brought by their mother from California to Helena, Montana, there to make their future home with her she acted in entire harmony with the California decree, which gave her the sole custody of these children and the right to determine their place of residence. Restatement, Conflict of Laws, §§ 146, 32, pp. 211, 57. She acted also with the consent and approval of the father as expressed in the settlement agreement of April 29, 1944.

Accordingly then she lost her California domicil, and acquired a new domicil of choice in Montana. Montana has been her domicil ever since. In re Coppock's Estate, 72 Mont. 431, 434, 435, 436, 234 P. 258, 39 A.L.R. 1152; Restatement, Conflict of Laws, §§ 29, 9, 15, pp. 54, 17, 32. Likewise in May 1944 the domicil of Max and Karen Enke also was lawfully fixed in Montana. Their domicil too has remained here ever since; for it is settled law that minor children whose parents are divorced take the domicil of the parent to whose custody they have been legally given. R.C.M. 1947 § 61-121; In re Metcalf's Estate, 93 Mont. 542, 546, 19 P.2d 905; Restatement, Conflict of Laws, § 32, p. 57. Moreover, these children have never since been physically present within the State of California nor for that matter so far as this record shows out of the State of Montana.

In these circumstances the fundamental question whether the California Court had jurisdiction on November 23, 1954, to make a valid order awarding the physical custody of these children to the father has been answered by different courts, treatises and learned authors in at least three different ways. The California Supreme Court itself in Sampsell v. Superior Court, 32 Cal. 2d 763, 777, 197 P.2d 739, has recently summarized these divergent views with authorities noted to support each in a paragraph which merits quotation here:

"Several theories have been advanced with respect to the correct basis for jurisdiction over the subject matter

of a child custody proceeding. According to one theory jurisdiction over children's custody is based on *in personam* jurisdiction over the children's parents. (Anderson v. Anderson, 74 W.Va. 124, 126, 81 S.E. 706.) Another theory regards the question of custody as simply one of status and as such subject to the control of the courts of the state where the child is domiciled. (Rest. Conflicts, 117, 148; see Goodrich, Custody of Children, 7 Corn. L.Q. 1, 2; 2 Beale, Conflict of Laws, p. 717; Dorman v. Friendly, 146 Fla. 732, 740, 1 So. 2d 734.) A third theory requires the child to be physically present within the state, on the ground that the basic problem before the court is to determine what the best interest of the child is, and the court most qualified to do so is the one having access to the child. (See Stumberg, Children and Conflict of Laws, 8 Univ. Chic. L. Rev. 42, 55-56; Stumberg, Conflict of Laws, p. 299; Sheehy v. Sheehy, 88 N.H. 223, 225, 186 A. 1, 107 A.L.R. 635.)"

Clearly in the Sampsell Case where both parents as at bar were themselves before the court, California leans toward the second of these theories, if in truth its Supreme Court does not adopt that premise outright as the foundation for its decision there. For it appears beyond any question from that opinion that California's jurisdiction in that case was bottomed upon the finding of a domicil for the child in California as distinguished from the personal jurisdiction which the lower court undoubtedly had over the parents, but which the California Supreme Court said was not enough. See Sampsell v. Superior Court, supra, 32 Cal. 2d, particularly at pages 773, 781.

Whether we are right or wrong, however, in our understanding of the Sampsell Case, our own conclusion at this point is that the second of these statements of the principle of law here involved is sound, and should be made the rule of our decision in this case. For this conclusion there are solid reasons, as we see them, not the least of

which is that in Talbot v. Talbot, 120 Mont. 167, 181 P.2d 148; and Thrift v. Thrift, 54 Mont. 463, 171 P. 272, this court has already committed itself to the doctrine that the state of a minor child's domicil is the state vested with jurisdiction to control his custody.

In the Talbot Case the facts differed from those of the controversy at bar, but the underlying principle, which determined the disposition of the writ of habeas corpus issued in that case, was nevertheless the same rule of law we apply in this proceeding. There Washington was the state of the domicil of the child whose custody was in issue, because Washington was the domicil of the parent (the mother) with whom the child lived after the separation of her parents and pending the divorce action brought at Seattle against the father. See Talbot v. Talbot, supra, 120 Mont. at pp. 172, 173. The authorities generally are in agreement here. Wear v. Wear, 130 Kan. 205, 222, 285 P. 606, 72 A.L.R. 425; Elliott v. Elliott, 181 Ga. 545, 182 S.E. 845; Callahan v. Callahan, 296 Ky. 444, 177 S.W. 2d 565; Boardman v. Boardman, 135 Conn. 124, 138, 62 A.2d 521, 13 A.L.R. 2d 295, and annotation at 306, pp. 308 to 310; Restatement, Conflict of Laws, § 32, pp. 57, 58; R.C.M. 1947, §§ 61-105, 61-106; 1 Beale, Conflict of Laws, Ch. 2, § 32.2, p. 216. Compare Cheever v. Wilson, 76 U.S. 108, 124, 19 L.Ed. 604, 608. It followed upon these facts that Washington had jurisdiction to award the custody of the child to the mother; and this court so held.

In Thrift v. Thrift, supra, the child of the parties lived with the father in Indiana, which was accordingly the state of his domicil. It followed upon these facts that the Montana court had no jurisdiction to award the custody of this child to the mother; and this court so held.

In short, by our finding here that Max and Karen Enke have been domiciled in Montana since May 1944 we have forecast the necessary conclusion consistent with our own precedents in the Talbot and Thrift Cases that the Cali-

fornia Court on November 23, 1954, was wholly without jurisdiction to enter any order touching their custody, because neither was then in, or domiciled within, the State of California. But we do not propose to rest our judgment in this case alone upon the narrow premise of our own decisions.

In the Restatement, Conflict of Laws, § 117, p. 177, we find the rule in point put in these words: "A state can exercise through its courts jurisdiction to determine the custody of children * * * only if the domicil of the person placed under custody * * * is within the state." Translated into the language of the controversy in hand this sentence means that the Superior Court of the State of California at Los Angeles on November 23, 1954, lacked the jurisdiction essential to its exercise of the authority it assumed under section 138 of the California Civil Code when it undertook to give the custody of these children to the father for the month of July of each year, i.e., because the children were not then domiciled in California.

The weight of authority holds to this view. Kruse v. Kruse, 150 Kan. 946, 96 P.2d 849; In re Hughes, 73 Ariz. 97, 237 P.2d 1009; Elliott v. Elliott, supra; In re Erving, 109 N.J. Eq. 294, 157 A. 161; State ex rel. Larson v. Larson, 190 Minn. 489, 252 N.W. 329; Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734; Gilman v. Morgan, 158 Fla. 605, 29 So.2d 372; Duryea v. Duryea, 46 Idaho 512, 269 P. 387; McAdams v. McFerron, 180 Miss. 644, 178 So. 333; Lake v. Lake, 63 Wyo. 375, 409 to 413, 182 P.2d 824; Callahan v. Callahan, supra; Commonwealth ex rel. Graham v. Graham, 367 Pa. 553, 80 A. 2d 829; Commonwealth ex rel. Freed v. Freed, 172 Pa. Sup. Ct. 276; In re Alderman, 157 N.C. 507, 73 S.E. 126; 2 Beale, Conflict of Laws, Ch. 5, § 144.3, pp. 717 to 719; 2 Nelson, Divorce and Annulment (2d Ed.), Ch. 15, § 15.32, pp. 216, 217; 43 C.J.S., Infants, § 5, pp. 52, 53; 31 C.J., Infants, § 6, pp. 988, 989; 17 Am. Jur., Divorce and Separation, § 689, p. 524.

The reasoning which leads to this solution is rested upon the law's recognition of the fact, which is not to be denied, that a child although a minor is nevertheless an entity distinct and apart from his father or mother, guardian or other person in whose custody by chance he may be at the moment. His separate existence is admitted, even when it is ignored. In general, however, as a person he has his individual rights under the law, and is held to an individual responsibility by the law, both commensurate with his age and mental stature.

In other words admittedly a minor has a juristic status of his own to which it is difficult indeed to deny recognition when his custody is the question before the court, and even though the contest is between his parents, who themselves have submitted to the jurisdiction of the court. For he is the real party in interest in any such case as is evidenced by the familiar rule that in awarding his custody the paramount inquiry is always his welfare and best interests.

It is thus that the custody of a minor has come to assume in the modern law at least the aspect of a distinct *res* akin to the marital status of husband and wife, but apart itself from either parent and always to be distinguished from their rights and responsibilities. Hence the rule that this *res* must in any case be before the court to give it the requisite jurisdiction, if the court would reach the question of custody. Hence the corollary of that rule that it is not enough the parents are themselves personally before the court bound by its orders and judgment, as the California Supreme Court put the problem in its opinion in the Sampsell Case cited.

The *res* must also be there, or jurisdiction fails. That *res* is made up of the rights and obligations which the phrase "custody of a minor" connotes, and by almost universal agreement among courts and legal scholars today is inseparable from the domicil of the minor him-

self. Where then the minor's dimicil is not within the jurisdiction at the time, as are the facts at bar, the *res* likewise is not within the jurisdiction. The courts may not proceed even with both parents before it. The authorities which we have noted heretofore in this opinion fairly sustain this statement of the law.

Nor is the father's case bolstered by the argument of his counsel that the California court had a continuing jurisdiction in November 1954 because it is conceded there was jurisdiction there in May 1944. That original jurisdiction was voluntarily surrendered by California and accordingly lost to its courts when with the father's consent the Superior Court at Los Angeles gave the sole custody of these children to the mother and itself consented that she fix their residence in Montana, or elsewhere outside of California, as she chose. She did not violate the California judgment or breach her agreement of April 29, 1944, with the father when she brought the children to Montana. This circumstance alone suffices to make the citation of State ex rel. Nipp v. District Court, 46 Mont. 425, 128 P. 590, and Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815, 70 A.L.R. 518, pointless. This distinction is plainly drawn by the Massachusetts court in the Hersey Case, and is the nub of its decision there upon the question of jurisdiction presented. See 271 Mass. at p. 551. Because this authority and others of like kind are upon their facts not applicable to our problems, we do not need to inquire further whether they reach a sound conclusion in point of law. Clearly they are not to be followed as precedents at bar. Nothing in Pearce v. Pearce, 30 Mont. 269, 76 P. 289, or State ex rel. Giroux v. Giroux, supra, or Kane v. Kane, 53 Mont. 519, 165 P. 457, is to the contrary.

Undoubtedly when a suit involving the custody of a minor is brought in the state of his domicil and process is personally served upon the person there vested with his

custody, jurisdiction attaches to determine any question touching that custody which may be raised. This was the case here in California which led to the interlocutory judgment of May 18, 1944, and the final judgment entered a year later. Probably that jurisdiction could not have been defeated by taking the children out of California before this final judgment was entered. Talbot v. Talbot, supra; Maloney v. Maloney, 67 Cal. App. 2d 278, 154 P. 2d 426. But with that judgment that suit ended. True these judgments were subject to modification under Cal. Civ. Code, Sec. 138, as in Montana a similar judgment may be modified under R.C.M. 1947, Sec. 21-138.

Yet to effect such a modification it is requisite that the parties be again brought before the court. This is tacitly conceded by the father's counsel at bar; for in October 1954 when the father moved the California Court to modify the original judgments his attorney served the mother in Montana to bring her again before that Court. Thereby the father initiated an entirely new proceeding in the old divorce suit, which had been closed in 1945. Unquestionably in that new proceeding the California Court reacquired jurisdiction over the mother in November 1954 when she appeared and litigated her rights before it. But that was not enough.

It was necessary also that the Superior Court have before it the subject matter. This the California Supreme Court itself has made very clear in its own opinion in Sampsell v. Superior Court, supra. This was as necessary to the jurisdiction of the Superior Court as that notice be given the mother, or that she appear personally. But the subject matter or *res* was at that time with these children at their domicil in Montana. The California court was powerless therefore to act upon it. Again the authorities cited earlier in this opinion sustain the conclusion stated.

The view to the contrary, upon which counsel for the father rely, that the jurisdiction of the California court

follows these children even under the facts of this case after their removal from that state does find support, however, in Maine in the *dictum* of Stetson v. Stetson, 80 Me. 483, 15 A. 60; in Missouri in a like *dictum* in Meredith v. Krauthoff, 191 Mo. App. 149, 187, 177 S.W. 1112, and perhaps in a few other states which have followed the Stetson Case. But these decisions are in the decided minority, and of little force today for the reasons which we have already detailed. In many of the cases the language used is again nothing but *dicta* with little or no support in the facts. These holdings are against the present weight of authority and out of step with the trend of the law now at this point. This is clearly pointed out in Beale, Conflict of Laws, supra, at pages 718, 719. We believe their reasoning is unsound. Accordingly we decline to accept them as persuasive precedents.

It follows then that the order of the California Court of November 23, 1954, does not come within the protection of the full faith and credit clause of the Constitution of the United States (U. S. Const., Art. IV, § 1), because it was made without jurisdiction. In re Alderman, supra; McAdams v. McFerron, supra; Gilman v. Morgan, supra; State ex rel. Larson v. Larson, supra; Griffin v. Griffin, 95 Ore. 78, 187 P. 598. Compare Talbot v. Talbot, supra, 120 Mont. at p. 175. It will accordingly be given no effect in Montana.

But the courts of Montana are, nevertheless, themselves open to the father where, in the state of his children's domicil, he may be heard. Nothing said in this opinion is to be understood as foreclosing him from applying to the proper district court of this state for an order touching his children's custody. But upon this record in this court he is entitled to no relief.

The writ of habeas corpus issued in these proceedings is discharged without prejudice; and the children, Max and

Karen Enke, are remanded to the custody of the respondent, Jean S. Baucus.

HORACE S. DAVIS
Associate Justice

We concur:
ALBERT H. ANGSTMAN
FORREST H. ANDERSON
Associate Justices

Mr. Chief Justice Adair and Mr. Justice Bottomly:

We dissent and reserve the right to file our written opinion and citation of authorities at a later date.

HUGH ADAIR
Chief Justice
R. V. BOTTOMLY
Associate Justice

Opinion of Chief Justice Adair and Associate Justice Bottomly

Mr. Chief Justice Adair concurring in part and dissenting in part:

I concur in the denial of the mother's motion seeking to quash the writ of habeas corpus issued herein and seeking to dismiss the proceeding in this court and am in accord with the reasons stated in the majority opinion for such denial.

However, as to those portions of the majority opinion which conclude, determine and adjudge invalid, null and void the modification order and judgment of the Superior Court of Los Angeles County, California, dated November 23, 1954, and entered November 26, 1954, and as to those portions of the majority opinion which purport to declare and construe the law and interpret the principles and decision in such fashion as to justify this court's action in declining to give either credit or effect to the modification made by the California Court of the custodial provisions of its own judgment, I respectfully dissent.

Stephen Enke and Jean Sheriff Enke were husband and wife. As issue of their marriage, a son, Max Sieben Enke, was born December 11, 1941, and a daughter, Karen Jean Enke, was born January 13, 1944.

After the birth of her daughter, the mother, Jean Sheriff Enke, commenced in the Superior Court of Los Angeles County, California, a suit for divorce against her husband Stephen Enke. The cause is entitled "Jean S. Enke, Plaintiff, vs. Stephen Enke, Defendant" and bears Superior Court No. D 258239.

To enable it to enter a valid decree or judgment in the action the court must have jurisdiction of both the subject matter and the parties to the suit.

Jurisdiction over Subject Matter. The law of California confers full jurisdiction of actions for divorce on the superior courts of that state. Grannis v. Superior Court, 146 Cal. 245, 79 P. 891, 106 Am. St. Rep. 23; Cooney v. Cooney, 25 Cal. 2d 202, 153 P. 2d 334.

Section 128 of the California Civil Code, in part, provides: "A divorce must be granted unless *the plaintiff* has been a resident of the state one year, and of the county in which the action is brought three months, next preceding the commencement of the action * * *." Emphasis supplied.

It is also the law of California that no divorce can be there had unless the prescribed facts of residence of the plaintiff appear and the proof thereof is a prerequisite to the granting of the divorce. A mere admission in the pleadings of such residence of the plaintiff is insufficient. Coleman v. Coleman, 23 Cal. App. 423, 138 P. 362; Ericksen v. Ericksen, 57 Cal. App. 2d 532, 134 P. 2d 825; Ungemach v. Ungemach, 61 Cal. App. 2d 142 P. 2d 99, 102.

At the time the plaintiff filed her complaint in the action and for a number of years next preceding the com-

mencement of the suit the plaintiff wife and the defendant husband were both bona fide residents of the State of California, actually living in the County of Los Angeles in such state wherein they had, kept and maintained their family home.

Thus did the Superior Court of Los Angeles County, California, have and acquire jurisdiction over the subject matter of the suit for divorce so commenced.

Jurisdiction over Plaintiff. By voluntarily coming into the Superior Court of Los Angeles County, California, with her marital troubles and by filing therein appropriate pleadings invoking the exercise of that court's powers to render her her rights under the law of California, the plaintiff wife submitted herself and the cause of action to the ultimate determination of such court for all purposes within the scope of her pleadings and thereby did the court acquire jurisdiction over the plaintiff Jean S. Enke. 21 C.J.S., Courts, § 83, subd. a, p. 122.

Jurisdiction over Defendant. The defendant Stephen Enke was duly served with process issued out of said Superior Court of Los Angeles County in the action and thereby did that court acquire jurisdiction over his person. 21 CJ.S., Courts, § 83, subd. b, p. 123.

Jurisdiction to Award Custody. Here the plaintiff wife was asking that the marriage bond be severed, that the parties be made single again and that the family, so far as it is one of the social units of the state, be destroyed.

An action for divorce is peculiar in its nature, in that, besides the interests of the parties involved, the public is also interested and the divorce court has before it interests to be adjudged and determined separate and distinct from those of the parties and these may not be ignored or disregarded. Bordeaux v. Bordeaux, 32 Mont. 159 at p. 165, 80 P. 6 at p. 8.

It follows that the state is deemed to be vitally interested in every divorce proceeding and when parents are divorced the welfare of their minor children becomes the grave responsibility of the trial court for the determination of the custody of such children is left to the sound and broad discretion of the court, the paramount question, irrespective of the feelings of the parents or others, being: What is best for the children and for their happiness and welfare?

The authority of the trial court over the minor children of parents involved in a divorce action may rest upon either or both of two theories, namely: (1) The interests of the state as *parens patriae* and (2) the personal rights of the parents as between themselves.

In the United States the state, as sovereign and not the general government, is *parens patriae* and as such has power of guardianship over persons under disabilities such as minors and insane and incompetent persons. It has been held that in an action for divorce involving the parents of minor children the trial court must keep in mind that the right of the state, whose wards the infant children become, rises above and is superior to that of the parents. Wadleigh v. Newhall (C.C. Cal.), 136 Fed. 941.

The statutes authorizing the California Courts to grant divorces expressly confer upon the court in which an action for divorce is commenced broad powers to make orders for the support, care and custody of the minor children of the parties upon granting a divorce, with express *continuing power* to modify the provisions of the so-called "final" decree as to such matters *at any time during the minority of the children of the marriage.*

Section 138 of the California Civil Code, so far as is here pertinent, provides: "In actions for divorce * * * the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the

minority of the children of the marriage, make such order for the custody of said minor children as may seem necessary or proper and may at any time modify or vacate the same."

Jurisdiction over the infant children of the marriage attached *at the time the plaintiff mother filed her complaint in the divorce action.*

At the time the plaintiff commenced her action for divorce both infant children of the parties were actually and physically present in the County of Los Angeles in the State of California then and there in the custody of and living with their parents.

The law is as declared in the well considered and much cited case of Maloney v. Maloney, 67 Cal. App. 2d 278 at p. 280, 154 P. 2d 426, wherein the court said:

"*When the action was commenced by plaintiff the children were in California under the joint control of their parents.* By his very act in commencing the action plaintiff submitted not only himself to the jurisdiction of the court but also the res, that is, his status as husband and as father. The court thereafter had the power to enter an effective judgment for him or against him, *in personam*, relative to any substantial allegation of the pleadings. Neither the mere physical departure of himself now that of the children from California in the least altered the jurisdiction of the court completely to determine the controversy which he had lithely initiated. (State v. Rhoades, 29 Wash. 61 (69 P. 389).) *Plaintiff cannot question the jurisdiction which by his own act he conferred. Although the children are beyond the territorial limits of California, they are still under the jurisdiction of the court below.* (Hersey v. Hersey, 271 Mass. 545 (171 N.E. 815, 818, 70 A.L.R. 518)), *which attached at the time the suit was filed.*" Emphasis supplied.

Civil actions in the courts of California are commenced by filing a complaint. California Code of Civil Procedure, §§ 405, 350.

From the moment the plaintiff mother filed her complaint in the divorce action the California Court was fully empowered to make such orders for the custody of the minor children as may seem necessary or proper.

"Here the divorce proceedings gave the state, through its courts, the right to determine the custody of the children." Stewart v. Stewart, 41 Cal. 2d 447, 260 P. 2d 44.

Thus did the Superior Court of Los Angeles County acquire and have jurisdiction to award the custody of the infant children with *continuing jurisdiction* "during the minority of the chidren", to make such further orders or modifications as may seem necessary or proper. Section 138, Cal. Civil Code.

Interlocutory Decree. On May 18, 1944, after a hearing that day had before the above Superior Court at which the plaintiff, Jean S. Enke, was represented by her counsel Alex W. Davis, Esq., the court rendered and caused to be filed in said divorce action No. D 258239, an interlocutory decree wherein, omitting its formal parts, the court found and adjudged:

"This cause came on to be heard before Honorable Kurtz Kauffman, Judge presiding in Department 29, on the 18th day of May, 1944, ALEX W. DAVIS appearing as attorney for plaintiff, and it appearing that defendant was duly served with process and has not appeared or answered the complaint, and that the default of defendant has been entered; and evidence having been introduced on the part of plaintiff, and said cause having been duly submitted to the Court for decision;

"IT IS ADJUDGED that plaintiff is entitled to a divorce from defendant; that when one year shall have expired

after the entry of this interlocutory judgment a final judgment dissolving the marriage between plaintiff and defendant be entered, and at that time the Court shall grant such other and further relief as may be necessary to complete disposition of this action.

"IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall have the sole custody of the minor children, MAX SIEBEN ENKE, aged 2½ years, and KAREN JEAN ENKE, aged 3½ months, and the right to determine their place of residence, and that Defendant shall have the right to correspond with the said children, and the right to visit them occasionally at the place of their residence at reasonable times and in reasonable manner after making arrangements with Plaintiff for such visits, and this court reserves the right to make appropriate orders for the support of the children.

"The clerk is directed to enter this decree.

"Done in open Court this 18 day of May, 1944.

"/s/ KURTZ KAUFFMAN, *Judge*

"NOTICE—CAUTION This is not a Judgment of Divorce. The parties are still husband and wife, and will be such until a final judgment of Divorce is entered after one year from the entry of this Interlocutory Judgment. The final Judgment will not be entered unless requested by one of the parties."

An interlocutory decree of divorce is, by the terms of the statutes (Sections 131, 131.5 and 132, California Civil Code) provisional and temporary only. Llewellyn Iron Works v. Industrial Acc. Comm., 191 Cal. 28, 214 P. 846; London Guaranty & Accident Co. v. Industrial Acc. Com., 181 Cal. 460, 184 P. 864.

The interlocutory decree being a mere declaration that one of the parties is entitled to divorce does not dissolve the marriage (Corbett v. Corbett, 113 Cal. App. 595, 298

P. 819; Remley v. Remley, 49 Cal. App. 489, 193 P. 604; Radich v. Radich, 64 Cal. App. 605, 222 P. 182) and the parties continue to occupy the relationship of husband and wife until the "final" judgment of divorce is entered and the appeal therefrom determined or until the time allowed by statute for taking an appeal has expired with no appeal taken. Vickers v. State Bar of Cal., 32 Cal. 2d 247, 196 P. 2d 10; Paulus v. Bauder, 106 Cal. App. 2d 589, 235 P. 2d 422; In re Fulton's Estate, 8 Cal. App. 2d 423, 48 P. 2d 120; Green v. Green, 66 Cal. App. 2d 50; 151 P. 2d 679; Borg v. Borg, 25 Cal. App. 2d 25, 76 P. 2d 218; Brown v. Brown, 170, Cal. 1, 147 P. 1168.

It follows that the interlocutory decree of May 18, 1944, did not dissolve the marriage of Stephen Enke and Jean S. Enke. On the contrary they remained husband and wife at least until such time as the "final" judgment of divorce should be entered in the cause and the time allowed for taking an appeal shall have expired with no appeal taken and both parties to the suit were so notified and warned.

Within a day or two after the entry, on May 18, 1944, of the above interlocutory decree the plaintiff Jean S. Enke, accompanied by the two infant children of the marriage left the State of California and removed to Lewis and Clark County, in the State of Montana, where all three have since lived and made their home. Compare Smith v. Ansley (Tex. Civ.), 257 S.W. 2d 156.

Final Judgment. On May 22, 1945, at the request of plaintiff's counsel of record there was filed and entered in the judgment book in the Superior Court of Los Angeles County, California, a "final" judgment of divorce in said cause No. D 258239 which, omitting the formal parts, recites and adjudges:

"In this cause an interlocutory judgment was entered on the 18th day of May, 1944, adjudging that plaintiff was entitled to a divorce from defendant, and more than one year having elapsed, and no appeal having been taken

from said judgment, and no motion for a new trial having been granted and the action not having been dismissed;

"Now, upon the Court's own motion, it is adjudged that plaintiff be and is granted a final judgment of divorce from defendant and that the bonds of matrimony between plaintiff and defendant be, and the same are dissolved.

"It is further ordered and adjudged that wherein said interlocutory judgment makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory judgment relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto.

"Done in open court this 21st day of May, 1945.

"/s/ WM. H. BAIRD, *Judge*

"Filed at request of MURPHY and DAVIS
"Address 514 Pacific Mutual Bldg.
"Los Angeles 14, California
"Attorney for Plaintiff by Alex W. Wavis.
"THIS JUDGMENT IS NOT EFFECTIVE UNTIL ENTERED IN JUDGMENT BOOK BY CLERK."

In the spring of 1947 the plaintiff Jean S. Enke and one John Baucus were married. Of their union a son, John Frederick Baucus was born September 19, 1949, who resides with his parents in Lewis and Clark County, Montana.

In the fall of 1951 the defendant Stephen Enke, married one Fay Enke, who, by a previous marriage has a daughter now aged seven years and son now aged eleven years, both of whom reside in the family home of Mr. and Mrs. Stephen Enke at Pacific Palisades in the State of California.

Thus have both the plaintiff Jean S. Enke and the defendant Stephen Enke, placed considerable faith and reliance in the validity of the final judgment of divorce so entered in the Superior Court of Los Angeles County, California, on May 22, 1945.

Affidavits by Plaintiff. In support of his petition for a writ of habeas corpus the petitioner filed in this court and offered, as his exhibits "A" and "B", two certain affidavits made by the plaintiff mother in Montana and both sworn to before E. G. Toomey, Esq., a notary public for the State of Montana and also an attorney at law and the counsel of record for the mother in this proceeding before this court. Both affidavits were offered in evidence and admitted as the mother's testimony at the hearing held November 23, 1954, in the Superior Court of Los Angeles County, California, in the proceeding, then pending and that day heard, on the father's application for modification of the decree and judgment in said cause No. D 258239, as is shown in the authenticated copy of the California Court's finding of fact and order of modification therein filed and entered on November 26, 1954, and quoted above.

Affidavit of October 22, 1954. The first of the above affidavits was made and sworn to by the plaintiff mother on October 22, 1954, and in part recites:

"I am the same person as Jean S. Enke, and as such I was the Plaintiff in the * * * divorce action, numbered 258239, in the Superior Court of the State of California, in and for the County of Los Angeles. The defendant in said action was at the commencement thereof my husband * * *

"On October 14, 1944, there was delivered to our home * * * in Helena, Montana, a piece of registered mail * * * receipted for by a maid * * * and delivered to me the same day. The envelope contained a typewritten carbon copy of Order to Show Cause and Affidavit In Re Modification of Child Custody Order of May 18, 1944, dated

October 1st, 1954, by Honorable Elmer D. Doyle, Judge of the above entitled Superior Court and * * * an Affidavit of Stephen Enke * * * and * * * an original letter addressed by * * * Lyman A. Garber, an attorney at law at 9437 Santa Monica Boulevard, Beverly Hills, California, to me, as 'Mrs. Jean Baucus' * * * at * * * Helena, Montana, wherein Lyman A. Garber stated:

"This letter constitutes a formal written demand upon you to appoint another attorney or to appear in person."

"In the said divorce action I was represented by the Law Firm of Murphey and Davis of Los Angeles, California, both members of which Law Firm have died since the entry of Final Judgment of Divorce. I have appointed Allan G. Ritter, an Attorney at Law, of 3946 Wilshire Boulevard, Los Angeles 5, California, whose office telephone number is Dunkirk 45380, to represent me by all proper and legitimate resistance to the proposed modification of Child Custody Order, as respects the provision for custody of children currently in force. * * *

"I oppose the proposed modification of custody provision and deny that the modification is for the best interests of said children, and I assert that the welfare, stability and best interests of said children requires that no modification of the custody provisions of the decree of May 18th, 1944, should be had.

"I note that in * * * the Affidavit of Stephen Enke, it is asserted, with respect to Affiant;

" 'Their mother, who expected to reside here after a vacation in Helena, Montana, is a permanent resident there.'

"I deny that I expected to reside in the State of California after the entry of the Interlocutory Decree of Divorce. * * *

"Within a few days after the entry of the Interlocutory Decree on May 18, 1944, Affiant returned to Helena,

Montana, with the said children, and ever since that time has resided in Helena, Montana, with the said children. * * *"

Affidavit of November 17, 1954. In her second affidavit made and sworn to on November 17, 1954, the plaintiff mother, inter alia, deposed:

"I am the same Jean S. Baucus who heretofore made Affidavit in this matter, dated October 22, 1954.

"On November 4, I received from my Attorney herein, Mr. A. G. Ritter, a second and further 'Order to Show Cause and Affidavit In Re Modification of Child Custody Order of May 18, 1944', wherein Stephen Enke, defendant above named is the affiant and wherein I am directed to show cause in the above-entitled Court at 9:30 o'clock A.M., on November 23, 1954, why said Child Custody Order of May 18, 1944 should not be further modified, that is, modified in two (2) particulars, in *Addition* to the modification as requested by Affidavit of said Stephen Enke, dated September , 1954, as said Affidavit is found with the first Order to Show Cause issued under date of October 1, 1954. * * *

"Affiant, mother of said children, resists the additional modifications requested by Stephen Enke and each thereof, Affiant continues to resist, also the modification requested by the defendant Stephen Enke in his Affidavit of September , 1954, upon which Order to Show Cause dated October 1, 1954, issued herein, as aforesaid."

Modification Order. In a supplementary proceeding by the defendant Stephen Enke in the Superior Court of Los Angeles County, California, in said cause No. D 258239 wherein the plaintiff Jean S. Enke (then and now Jean S. Baucus) was represented by her counsel Allan G. Ritter, Esq., and the defendant Stephen Enke was represented by his counsel Lyman A. Garber, Esq., written findings of fact and an order of modification were filed

November 26, 1954, which, omitting the formal parts, recite:

"No. D-258239. Findings of Fact by Court Commissioner and Order. O.S.C. Re Modification

"By direction of the court the matter of taking proof and reporting conclusions of fact relative to the O.S.C. Re Modification came on regularly for hearing before the undersigned court commissioner on Nov. 23, 1954, the following named witnesses were sworn and examined; defendant, Fay Enke, Prynce Hopkins.

"The evidence being concluded and the matter submitted, the facts and special findings as to parties, income and resources are found as follows:

"By Interlocutory Judgment dated May 18, 1944, the custody of the minor children, Max Sieben Enke and Karen Jean Enke, was granted to the plaintiff together with the right to determine their place of residence. The defendant was granted the right to correspond with said children and to visit them occasionally at the place of their residence at reasonable times and in a reasonable manner after making arrangements with the plaintiff before such visits. It was stipulated that the affidavit of the defendant be received in evidence, subject to additional direct and cross-examination. It was stipulated that the affidavits (2) of the plaintiff be received in evidence as her testimony. The defendant waives his right of cross-examination thereon. At the time the Interlocutory Judgment was entered the older child, a boy, was aged 2½ years, and the younger child, a girl, was aged 3½ months; they are now aged 12 and 10. The defendant at present is a Research Scientist for the Air Force. At the time of the Interlocutory Judgment the plaintiff, with the 2 minor children, moved to Helena, Montana, and has resided in that general area since that time. The plaintiff has remarried a man by the name of *Bauses* and has a child as a result of said marriage. From 1944 to 1947

the defendant requested permission of the plaintiff to see the minor children but was refused permission. From 1948 to September 15, 1951 the defendant made no particular effort. Thereafter the defendant remarried; his wife has 2 children, a girl aged 16 and a boy aged 12, by a previous marriage, and at present are living in Pacific Palisades near the coast. The children of the parties hereto have been registered in school in Montana under the name of *Bauses* instead of their true name, Enke. The defendant desires the right of having the physical custody of the children for a period of time during their summer vacations. In 1954 the defendant saw the children briefly on 2 occasions in Montana, once on his way to Europe and second time upon his return. Each of these visits was brief and not particularly satisfactory to either the defendant or the children. Over the years since the Interlocutory Judgment, the defendant has communicated with the children from time to time and on various occasions has sent them gifts. The defendant attends church on occasion and was married the last time in a church. His present wife is an American citizen and she would be happy to have the children visit them in their home. The best interest of the minor children require that they should have the opportunity to become better acquainted with and to know their father. Both the plaintiff and defendant are fit and proper persons to have the physical custody of the minor children. There is a material change of circumstances in that the children are older than at the time of the Interlocutory Judgment herein.

"RECOMMENDATION

"REFERRED TO COMMISSIONER OLIVER FOR FINDINGS AND RECOMMENDATION

"The Interlocutory Judgment is modified in the following particulars only: The defendant may have the physical custody of the minor children for the month of July of

each year, beginning July, 1955; the defendant is ordered to provide the necessary transportation to and from the home of the plaintiff. The plaintiff is restrained from registering the minor children in school or elsewhere in any name other than their natural surname of Enke. Notice waived 259A CCP.

"DATED: Nov. 23, 1954

"SO ORDERED (Signed by Judge and Court Commissioner)."

The above order so modifying the visitation and custodial provisions of the interlocutory decree of May 18, 1944, and the final judgment of divorce entered May 22, 1945, was appealable. Had the plaintiff mother deemed herself aggrieved thereby she could and she ought to have taken an appeal therefrom. This she did not do and the time allowed by statute for taking such appeal was allowed to pass and expire with no appeal taken.

In Ruberts v. Ruberts (1955), 4 Ill. App. 2d 134, 123 N.E. 2d 737 at p. 738, it is said:

"The order * * * relates only to the subject of visitation, not custody, and it appears that that was the only modification effected by the Trial Court, as that Court continued the full care, custody, and control of the children in the mother. It is noted that the Order of the Trial Court gives the plaintiff the right of visitation of the children during the time when they would be in the home of the defendant. We do not believe that the order allowing the father to have the children in his home for a month in the Summers and two days in each October and March creates a change in custody rather than a modification of the visitation privilege * * *

"We do not believe that under the particular facts in the case before us the Order of the Trial Court materially abridged the plaintiff's rights to the custody of the children. Certainly the Chancellor should be allowed

broad discretion when the question of altering visitation privileges is involved. Wade v. Wade, 345 Ill. App. 170, 102 N.E. 2d 356."

At the hearing held before the court commissioner on November 23, 1954, the mother and her interests were there fully represented by her attorney Allan G. Ritter, Esq., who pursuant to stipulation with defendant's attorney Lyman A. Garber, Esq., introduced in evidence as plaintiff's traverse and testimony at the hearing, the two affidavits theretofore made by plaintiff.

Thus did the plaintiff make a general appearance at the hearing and in the proceedings which resulted in the modification order and thereby did she voluntarily submit to the jurisdiction of said Superior Court in such proceedings and she stands bound by its determination and order. There having been no appeal from the order of modification "it is binding not only upon the parties to the action but upon the courts as well." Benson v. Benson, 121 Mont. 439 at p. 444, 193 P. 2d 827.

It has been held that a divorce court may determine the matter of custody of a child who is not within the territorial jurisdiction of the court, and who is not residing nor domiciled within the state, if the person who has actual custody of the child is before the court either by personal service of process or by general entry of appearance. Beckmann v. Beckmann (Mo. App.), 211 S.W. 2d 536 at p. 540.

The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding custody of minor children, including the lawful modifications thereof, made by a court of one state shall be conclusive in the jurisdiction of the other states where, as here, the court granting the decree and the modification order had acquired jurisdiction over the subject matter and over the person of both the plaintiff and the defendant.

Upon the entry of the decree awarding their custody the minor children became wards of the Superior Court of Los Angeles County and thereafter, by the express provisions of Section 138 of the California Civil Code, that Court was empowered to give such further direction for their custody and care during their minority as may seem necessary or proper. Compare Benson v. Benson, supra.

Habeas Corpus. In this original proceeding in habeas corpus Stephen Enke, the father, now and for many years past a citizen and bona fide resident of the State of California, by petition filed July 2, 1955, has invoked the original jurisdiction of this court to obtain visiting rights and privileges, including temporary custody during the month of July of his son Max Sieben Enke and his daughter Karen Jean Enke, both being minor children of school age.

The father grounds his petition and right to the writ upon the modification order and judgment of the California Court dated November 23, 1954, and entered November 26, 1954, providing that the father "may have the physical custody of the minor children for the month of July each year, beginning July, 1955" and that he shall provide the necessary transportation to and from the home of the mother.

The father's petition for the writ, *inter alia,* shows: That the father had been in communication with the mother and with her attorney in Montana in an attempt to effect the visitation specified for July 1955; that the mother's attorney had given indication that the mother was intending to abide by the modification order and judgment of the California Court; that the father delivered to the children's mother air line tickets on Western Airlines from Helena, Montana, to Los Angeles for the flight leaving Helena air port at 7:00 o'clock a.m. on July 1, 1955; that no confirmation of space on such flight was made by the children's mother or anyone on her behalf; that such flight departed Helena and the children were not aboard

the plane; that the mother has not obeyed the aforesaid modification order and judgment; that she does not intend to obey same; that unless ordered by the courts of Montana she intends to and will further hold the children allegedly and in violation of the said modification order and judgment; that the mother is unlawfully restraining the children and that she is unlawfully withholding their physical custody from the father.

At the time of filing his petition for the writ of habeas corpus the father produced and filed in this court properly authenticated copies of (1) the interlocutory decree, (2) the final judgment of divorce and (3) the findings of fact and order of modification of the judgment, all given and entered in said action for divorce so commenced and prosecuted by the plaintiff mother, Jean S. Enke, in the Superior Court of Los Angeles County, California, against the defendant husband and father, Stephen Enke, being No. D 258239 therein;

Jurisdiction Acquired and Exercised. All parties concede that at the time the interlocutory decree was entered (May 18, 1944) and the final judgment of divorce was entered (May 22, 1945) the California Court then had full and complete jurisdiction over both the subject matter and the parties; that it then had ample authority and power to give and enter both the interlocutory decree and the final judgment of divorce and that each was and is a valid and binding adjudication.

Now what happened to the *continuing jurisdiction* of the California Court (§ 138, Cal. Civ. Code; Foster v. Foster, 8 Cal. 2d 719, 68 P. 2d 719 at p. 722; Maloney v. Maloney, 67 Cal. App. 2d 278, 279, 154 P. 2d 426; Falconer v. Falconer, 95 Cal. App. 2d 4, 212 P. 2d 5 at p. 6) so acquired and exercised by such Court.

"When a plaintiff invokes the jurisdiction of a court of this state to determine the question of custody * * * of his children he may not thereafter deny that the court

has jurisdiction to make an order upon the subject presented by his own pleadings." Falconer v. Falconer, supra.

Surrender of Jurisdiction. The majority opinion recites that on April 29, 1944 (being but nineteen days prior to the entry of the interlocutory decree of May 18, 1944), the father and mother came to the parting of their ways and as of that date they executed a "settlement agreement" wherein they mutually agreed that the mother shall have the sole custody of the two infants—the daughter then aged three months and the son then aged two years and that, "Subsequently the mother sued for divorce in the Superior Court of Los Angeles County, California • • •"

The Majority opinion says that the *original jurisdiction* which necessarily was first acquired and then on May 18, 1944, and again on May 22, 1945, exercised by the California trial court in its divorce decree No. D 258239, "was voluntarily surrendered by California and accordingly lost to its courts when with the father's consent the Superior Court of Los Angeles gave the sole custody of these children to the mother and consented that she fix their residence in Montana, or elsewhere outside of California, as she chose."

Thus does the majority opinion conclude that by executing the "settlement agreement" on April 29, 1944, and before the mother had even commenced her suit, the father authorized California to voluntarily surrender the original jurisdiction which its Superior Court in Los Angeles County was about to acquire, if and when the mother should commence her action, through signing such "settlement agreement" and that the subsequently acquired jurisdiction over the infant children of the parties was voluntarily surrendered by California and accordingly lost to its courts before such jurisdiction had been either acquired or invoked.

Of course such is not the law of either California or Montana.

In California. The rights of the mother respecting the custody of her minor children after her divorce "were derived solely" from the trial court's orders made in the divorce action (Watkins v. Clemmer, 129 Cal. App. 567, 19 P. 2d 303 at p. 307) and not from the so-called "settlement agreement" entered into with the father prior to the time she filed her suit for divorce. Also see McCoy v. McCoy, 38 Cal. App. 2d 637, 102 P. 2d 384; Lucachevitch v. Lucachevitch, 69 Cal. App. 2d 478, 159 P. 2d 688; Puckett v. Puckett, 21 Cal. 2d 833, 136 P. 2d 1; In re Arkle's Estate, 93 Cal. App. 404, 169 P. 689; Van der Vliet v. Van der Vliet, 200 Cal. 721, 254 P. 945; Anderson v. Anderson, 56 Cal. App. 87 204 P. 426.

In Montana. In Kane v. Kane, 53 Mont. 519 at pp. 524, 526, 165 P. 457, this court speaking through Mr. Justice Holloway said:

"Though the separation agreement is binding upon the parties to it and regulates their rights and obligations *inter sese*, it is not binding upon either the child or the court. If its provisions for the care of the child are inadequate or become inadequate, the father may be called upon to supplement them by further contributions, notwithstanding the agreement by the mother releasing him from further costs or expenses. The child is the ward of the court, and, even if the parents agreed that the father should not enjoy the privilege of seeing his offspring, the court may nevertheless authorize him to visit it if the interests of the child will be thereby promoted. * * *

"The conditions under which the father's visits may be made, the time, place and duration of them, his conduct during such visits, and the extent to which he may have the child in his custody, are all proper subjects for regulation by the court. It cannot be said that by the modification sought, the father gains a distinct advantage without any

concomitant burden. When he submitted to the jurisdiction of the court, he was there for any proper order the court might make, and if the court requires him, as a condition precedent to his right to visit his child, that he make further reasonable contributions to its support, he will not be in any position to complain * * *

"Unless it can be said with reasonable certainty that the father is morally unfit to associate with the child, the dictates of humanity call for such regulations as will permit him to see his own offspring. 'It must be borne in mind that the tie between parent and child is one of the most binding in human life, one which the law of nature itself has established. No legislation, no judicial interpretation of legislation, should lightly disregard the reciprocal duties of this relationship.' (State ex rel. Giroux v. Giroux, 19 Mont. 149, 47 P. 798.)" To the same effect see State ex rel. Floch v. District Court, 107 Mont. 185 at pp. 190, 191, 81 P. 2d 692.

In Pearce v. Pearce, 30 Mont. 269 at pp. 271, 272, 76 P. 289, this court said:

"The point is made by the appellant that the said contract by which it was agreed, under the circumstances narrated, that the husband should have the custody of the child, is void as against public policy. It is not necessary to discuss that question. Section 192 of the Civil Code 1895 (now section 21-138, Rev. Codes of Montana of 1947) is as follows: 'In an action for divorce the court or judge may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.' *We cannot understand how this language can be misunderstood, or how two persons can form different opinions as to what it means.* The marriage laws are intended to establish families, and to protect children resulting from the conjugal union. When parents have unfortunate differences, and invoke the law

of divorce for the purpose of separation, the prime duty of the court is to see that the infant children are protected; and *if the parents do not*, by proper petition, *ask the court to make a proper order for the care and protection of their helpless offspring, the court should and may of its own motion inquire into the facts and make the necessary order, and must do so when moved by either party, whether such party was in default, or not, in the suit, or is the guilty party.* If it makes a mistake in the first instance, it may and should remedy the same, upon a proper showing, as soon thereafter as possible; and the law, in its beneficence, and with a tender care for the infants, has provided the means set forth in Section 192 quoted above." Emphasis supplied.

In State ex rel. Graveley v. District Court, 119 Mont. 276 at pp. 283, 284, 174 P. 2d 565, this court speaking through Mr. Justice Angstman said:

"The fact that the children would, for all practical purposes, be denied the companionship and advice of their father is a circumstance to be taken into consideration in weighing the question as to what is best for them. 'The family relation and love between a child and its parents constitutes one of the holiest impulses toward good conduct and correct living. It is more than wealth, honors, or power, and we believe that courts should be loath to take any steps, or make any orders, which will prevent the play of the powerful impulse to good action on the part of the parents for their offspring.' Futch v. Futch, Tex. Civ. App. 299 S.W. 289, 292.

"This is not only an important right of the father but a right which affects the welfare of his boys and should not be taken away except for reasons touching the welfare of the boys. Turner v. Turner, 86 N.H. 463, 169 A. 873."

In Kelly v. Kelly, 117 Mont. 239, at pp. 247, 248, 157 P. 2d 780, in his dissenting opinion, Mr. Justice Angstman said:

"The trial court, it should be remembered, was in a better situation to determine what is best for the children than are we. The district judge saw Mr. Kelly and his present wife and the other witnesses, and heard them testify. * * * To the credit of Mr. Kelly it should be said that he has visited the children three times since going to Seattle and before that he visited them 'every couple of months' but was not permitted by Mrs. David to take the children to town or off the place.

"I am not prepared to say that Judge Besancon abused his discretion in awarding the custody of these boys to Mr. Kelly. * * *

We should be careful not to permit our disgust for the conduct of the father in the past to work to the permanent detriment of the children. I should say in passing that the fact that the divorce was granted for fault of the husband does not necessarily bar him from the right to the custody of the children. Boles v. Boles, 60 Mont. 411, 199 P. 912."

"Suit Ended." Conceding that when it gave and entered the interlocutory decree (May 18, 1944) and the final judgment (May 22, 1945) in its divorce action No. D 258239, the Superior Court of Los Angeles County had theretofore acquired the requisite original jurisdiction to render a valid decree and judgment, the majority opinion then says, "Probably that jurisdiction could not have been defeated by taking the children out of California before the final judgment was entered. *But with that judgment that suit ended.*"

Not at all.

The reason:

THERE CAN BE NO FINAL JUDGMENT AS TO INFANT CHILDREN, IN A DIVORCE CASE. Keith v. Keith, 270 Ky. 655, 110 S.W. 2d 424 at p. 427; White v. Shalit, 136 Mo. 65, 1 A. 2d 765 at p. 767.

The entry of the so-called "final" judgment in divorce suit No. D 258239 did not end such suit because of the *continuing jurisdiction* expressly conferred upon the Superior Court by the California statute which provides: "In actions for divorce * * * *the court may* * * * at the final hearing *or at any time thereafter during the minority of any of the children of the marriage,* make such order for the custody of such minor children as may seem necessary or proper *and may at any time modify or vacate the same.*" Emphasis supplied. Section 138, Cal. Civ. Code.

"But * * * there can be no doubt that once jurisdiction attaches to grant a divorce and award custody of the minor children of the marriage, our statute provides that *such jurisdiction is continuing and the power to amend, modify or annul an award of custody* as existing conditions demand *ever after remains.*" Emphasis supplied. Kelly v. Kelly, 75 Cal. App. 2d 408, 171 P. 2d 95 at p. 99. To like effect see Noon v. Noon, 84 Cal. App. 2d 374, 191 P. 2d 35 at p. 38; Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P. 2d 656 at p. 660; Exley v. Exley, 101 Cal. App. 2d 831, 226 P. 2d 662; Lucachevitch v. Lucachevitch, 69 Cal. App. 2d 478, 159 P. 2d 688 at p. 692; Moon v. Moon, 62 Cal. App. 2d 185, 144 P. 2d 596 at p. 598.

There is no permanent finality to custodial award of minor children. State v. Pate (1953), 120 Cal. App. 2d 699, 261 P. 2d 788; Sampesell v. Superior Court of Los Angeles County, 32 Ca. 2d 763; 197 P. 2d 739; Ex parte Memmi (1947), 80 Cal. App. 2d 295, 181 P. 2d 885; Horsley v. Horsley, 77 Cal. App. 2d 442, 175 P. 2d 580; Dotch v. Grines, 75 Cal. App. 2d 418, 171 P. 2d 506; Cooney v. Cooney, 25 Cal. 2d 202, 153 P. 2d 334.

The Superior Court of Los Angeles County, California, in the exercise of the jurisdiction so conferred upon it by section 138 of the California Civil Code, which jurisdiction the plaintiff mother invoked when she filed her complaint,

awarded to her the custody of the two children but such award was in legal effect a conditional one. There was attached thereto the condition imposed by and implied from the California statute (§ 138, supra) of which she was bound to take notice that the right in the Superior Court to vacate or modify the order and award at any time during the minority of the children was and is expressly reserved. As was said in Morrill v. Morrill, 83 Conn. 479, 77 A. 1 at p. 5; "It scarcely lies in her mouth to now question its (the California Court's) authority, when invoked by her then husband, whom she summoned to its (the California Court's) jurisdiction, to exercise the authority thus reserved, although her voice is heard from without the confines of the state."

In Dolgoff v. Dolgoff, 81 Cal. App. 2d 146, 183 P. 2d 380 at p. 382, it is said: "It has been decided by the great weight of authority that when a court has acquired jurisdiction of the parties to a divorce suit it retains ancillary jurisdiction to modify the decree of divorce by awarding to either spouse the custody or necessary maintenance of their minor child, for its best interest, even though one of the spouses has acquired a residence with the child in another state. In re Kolb, 60 Cal. App. 198, 200, 212 P. 645, 646; Stephens v. Stephens, 53 Idaho 427, 24 P. 2d 52, 55; 70 A.L.R. 526 and note."

"Where one puts in motion the process of a court or seeks to use the procedure of the court for the purpose of obtaining a benefit for himself, jurisdiction is conferred over him so far as the defendant in the proceeding or the court is concerned." Delco Ice Mfg. Co. v. Frick Co., 318 Pa. 337, 178 A. 135, 139. Compare: Alee v. Van Cleave (1954), Tex. Civ. App., 263 S.W. 2d 276; Application of Habeck (1955), S.D. , 69 N.W. 2d 353; Chittick v. Chittick (1955), Mass. , 126 N.E. 2d 495; Sherrer v. Sherrer, 334 U.S. 343, 92 L.Ed. 1429; Coe v. Coe, 334 U.S. 378, 92 L. Ed. 1451; Humphreys v. Smith,

81 Okla. 104, 197 P. 155; Keller v. Keller, 352 Mo. 877, 179 S.W. 2d 728 at p. 731; Christ v. Jovanoff, 84 Ind. App. 676, 151 N.E. 26, 152 N.E. 2.

Jurisdiction of Subject Matter. While the majority opinion concedes that the judgments entered in the divorce suit No. D 258239 were subject to modification under Section 138 of the California Civil Code as they would be in Montana under Section 21-138 of the Revised Codes of Montana of 1947, the majority opinion herein says, "Yet to effect such a modification it is requisite that the parties be again brought before the court." The majority opinion further states that in November 1954 when the father's application for a modification was presented to the California Court "the subject matter or res was at the time with these children at their domicil in Montana. The California Court was powerless therefore to act upon it."

The law fails to sustain such conclusions and holding.

In Maloney v. Maloney (1947), 67 Cal. App. 2d 278, 154 P. 2d 426-427, the court said:

"The question for decision is whether the superior court in an action for divorce filed by the husband may make an order against him relative to the custody of the minor children, after he had departed from the state with the children. * * *

"Numerous decisions are reported in support of the proposition that where jurisdiction of the person or of the res has once attached it is not defeated by the removal of the person or of the res beyond the jurisdiction of the court. 15 Corpus Juris, p. 824; 21 C.J.S., Courts, § 93. Jurisdiction once acquired is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of the action was made. Bigelow v. Washburn, 98 Wis. 553, 74 N.W. 362. * * * Although the children are beyond the territorial limits of California, they are still under the jurisdiction of the court

below (Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815, 818, 70 A.L.R. 518), *which attached at the time the suit was filed.*

"The authorities cited by plaintiff in support of his appeal * * * are not pertinent. In those cases, whether no personal service was ever had upon the party against whom the appealed judgment had been entered, or the children involved were outside of the jurisdiction of the court from a date prior to the commencement of the action. All of them are founded upon the inefficacy of substituted service of process as a means of obtaining a judgment in Personam." Emphasis supplied.

In White v. Shalit, 136 Me. 65, 1 A. 2d 765, Chief Justice Dunn speaking for the court, concerning the authority and the reserved or continuing jurisdiction conferred by the Maine statute, which is similar to section 138 of the California Civil Code, said:

"And there may be, from time to time, concerning children, variance of the decree, 'as circumstances require.' Section 14. Stratton v. Stratton, 73 Me. 481, so recognizes.

"The language of the statute is comprehensive.

"Exercise of delegated power and discharge of conjoined duty are not restricted to any particular period within the minority of the children, nor is especial retention of this branch of the case, while proper practice, prerequisite to revising the decree. *The statute preserves jurisdiction beyond the ability of the parties to exclude, or the court to deprive itself.*" (Citing cases.)

"*'That which is implied in the statute is as much a part of it as that which is expressed.'* 59 C.J. 973. *The court retains seizin of the divorce suit.* (Citing case.) The decree is a conditional one; prerogative to enter and to vary it is devolved in the same terms. (Citing case.)

"*There can be no final judgment as to infant children, in a divorce case.* (Citing case.) *Minor children of*

divorced parents are wards of the court. (Citing case.) Theirs are new legal statuses. Stetson v. Stetson, 80 Me. 483, 15 A. 60. *Taking a child out of the state does not preclude the court.* Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815, 70 A.L.R. 518; Stetson v. Stetson, supra.

"* * * *But, the child is not removed from the jurisdiction of the court. 'That has,' as Judge Danforth observes, 'already attached.'* Stetson v. Stetson, supra." Emphasis supplied.

In State ex rel. Nipp v. District Court, 46 Mont. 425, 128 P. 590, Ann. Cas. 1916B 256, this court upheld and gave full faith and credit to a modification order entered by a Nebraska court which had granted a decree of divorce. The modification order was made at a time when both the child and the parent having the legal custody thereof were in Montana. In that case Mr. Chief Justice Brantly, speaking for the court, said:

"Notwithstanding the removal, the Nebraska court retained its jurisdiction, and it was competent for it to so amend the decree that the mother could enforce the right thereby accorded to her. (Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1; Hammond v. Hammond, supra (90 Ga. 527, 16 S.E. 265); Wakefield v. Ives, supra (35 Iowa 238); Stetson v. Stetson, supra (80 Me. 483, 15 Atl. 60); Baily v. Schrader, 34 Ind. 260; State v. Rhoades, 29 Wash. 61, 69 Pac. 389.) And, as has already been said, in the absence of a showing of circumstances occurring since the amendment requiring the court of this state, in the interest of the son, to order otherwise, this part of the decree is to be enforced together with its other provisions, the effect to be given the record in this state being the same as that which is given to it in the state from which it came. (Rev. Codes, sec. 7919 (1907, now R.C.M. 1947, § 93-1001-25)."

In Talbot v. Talbot, 120 Mont. 167, 181 P. 2d 148, this court affirmed a Montana district court in giving full faith and credit to a decree of a Washington court given in an

action for divorce which awarded to the mother the custody of a minor child who was at the time the decree was entered and the award given, absent from the State of Washington. There the court said:

"The rule is not inflexible that the court will never award the custody of a child who at the time of the adjudication is physically without the jurisdiction of the court. Wear v. Wear, 130 Kan. 205, 285 Pac. 606, 72 A.L.R. 425; Hughes v. Hughes, 180 Ore. 575, 178 Pac. (2d) 170; State v. Rhoades, 29 Wash. 61, 69 Pac. 389; Stephens v. Stephens, 53 Idaho 427, 24 Pac. (2d) 52; Maloney v. Maloney, 67 Cal. App. 2d 278, 154 Pac. (2d) 426; Anderson v. Anderson, 74 W. Va. 124, 81 S.E. 706; and see 27 C. JS., Divorce, Sec. 303, page 1164."

In Krasnow v. Krasnow (1953), 140 Conn. 254, 99 A. 2d 104 at p. 106, it is said:

"The plaintiff's first contention is that the court was without jurisdiction to make any award of custody because the child was not a resident of, or domiciled in, this state at the time the divorce action was begun or the judgment entered. * * * The defendant having submitted to the jurisdiction of the court, the whole matter of the marital status of the parties and the effect of any change therein upon minor children was before the court. Fagan v. Fagan, 131 Conn. 688, 690, 42 A. 2d 41; Maloney v. Maloney, 67 Cal. App. 2d 278, 280; 154 P. 2d 426; Stephens v. Stephens, 53 Idaho 427, 437, 24 P. 2d 52; Talbot v. Talbot, 120 Mont. 167, 173, 181 P. 2d 148; Wilson v. Wilson, 66 Nev. 405, 212 P. 2d 1066, 1072; Anderson v. Anderson, 74 W. Va. 124, 126, 81 S.E. 706; * * * Furthermore, one such as this plaintiff, who has invoked the jurisdiction of the court in order to secure a divorce and the custody of a minor child, cannot thereafter assail it. Morrill v. Morrill, 83 Conn. 479, 489, 77 A. 1; Blair v. Blair, 48 Ariz. 501, 507, 62 P. 2d 1321; 3 Freeman, Judgments (5th Ed.), § 1438; 27 C.J.S., Divorce, § 171, p. 815." Also see: Burns

v. Shapley, 16 Ala. App. 297, 77 So. 447; Ex parte Mullins, 26 Wash. 2d 419, 174 P. 2d 790; Middleton v. Tozer (1953), Mo. App., 259 S.W. 2d 80 at pp. 87, 88; Lane v. Lane (1945), Mo. App., 186 S.W. 2d 47 at p. 50; Hughes v. Hughes (1947), 180 Ore. 575, 178 P. 2d 170 at p. 172; Levell v. Levell (1948), 183 Ore. 39, 190 P. 2d 527 at p. 530.

The Constitution of the United States has a provision which reads: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings, of every other state." Article IV, § 1.

The issue before this court on the instant *original proceeding* is whether the judgment of the Superior Court of Los Angeles County, California in its cause No. D 258239 is here entitled to full faith and credit under Article IV, § 1 of the Constitution of the United States.

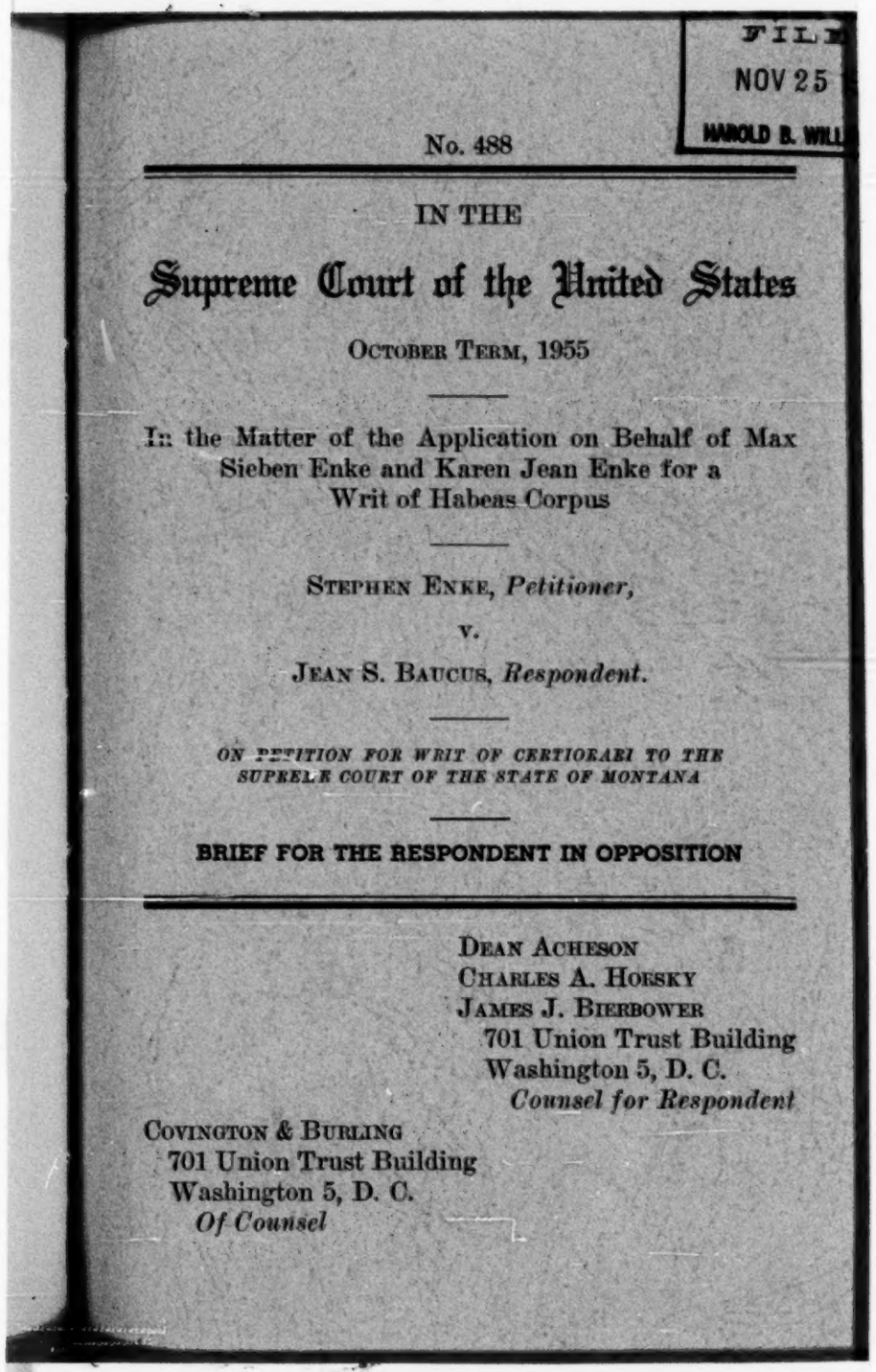
The Superior Court of Los Angeles County California acquired and had jurisdiction of both the subject matter and parties at the time it rendered and entered the interlocutory decree—the final judgment and the order of modification in its cause No. D 258239. The adjudications are valid on their face and this court should give full faith and credit thereto. See Allee v. Van Cleave, supra; Application of Habeck, supra; Sherrer v. Sherrer, supra; Coe v. Coe, supra, and Chittick v. Chittick, supra.

HUGH ADAIR
Chief Justice

I concur in Mr. Chief Justice Adair's above opinion.

R. V. BOTTOMLY
Associate Justice

BRIEF FOR THE RESPONDENTS IN OPPOSITION



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No. 488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

In the Matter of the Application on Behalf of Max Sieben Enke and Karen Jean Enke for a Writ of Habeas Corpus

STEPHEN ENKE, *Petitioner*,

v.

JEAN S. BAUCUS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Questions Presented	1
Statement	2
Reasons for Denying the Petition	4
1. By the Nature of the Action Brought in Montana No Federal Question Now Exists	4
2. The Montana Decision Does Not Deny Full Faith and Credit Under Decisions of This Court	6
Conclusion	14

TABLE OF CITATIONS

Cases:

Boens v. *Bennett*, 20 Cal. App. 2d 477, 67 P. 2d 715 (1937) .. 13
In re Bort, 25 Kan. 308 (1881) 8
In re Chandler, 36 Cal. App. 2d 583, 97 P. 2d 1048 (1940) .. 13
Dotsch v. *Grimes*, 75 Cal. App. 2d 418, 171 P. 2d 506 (1946) 10
Giroux v. *Giroux*, 19 Mont. 149, 47 Pac. 798 (1897) 5
Halvey v. *Halvey*, 330 U.S. 610 11
Larson v. *Larson*, 190 Minn. 489, 252 N.W. 329 (1934) 8
May v. *Anderson*, 345 U.S. 528 12
Ex parte Reinhardt, 88 Mont. 282, 292 Pac. 582 (1930) 4
Sampsell v. *Superior Court*, 32 Cal. 2d 763, 197 P. 2d 739 (1948) 10, 13, 14
State ex rel. Nipp v. *District Court*, 46 Mont. 425, 128 Pac. 590 (1912) 5
In re Svoboda's Guardianship, 92 Cal. App. 2d 136, 206 P. 2d 672 (1949) 8
Talbot v. *Talbot*, 120 Mont. 167, 181 P. 2d 148 (1947) 5

Miscellaneous:

Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev. 345 (1953) 6, 13
Restatement, *Conflict of Laws* § 32 (1934) 7
Restatement, *Conflict of Laws* § 145 (1934) 7
Stansbury, *Custody and Maintenance Law Across State Lines*, 10 Law & Contemp. Prob. 819 (1944) 6, 13

IN THE

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In the Matter of the Application on Behalf of Max Sieben Enke and Karen Jean Enke for a Writ of Habeas Corpus

STEPHEN ENKE, *Petitioner,*

v.

JEAN S. BAUCUS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The questions relate to the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution. The first question is whether, because of the limited nature of a writ of habeas corpus in child custody cases issued out of the Supreme Court of Montana, there is

any question of full faith and credit presented in this case at the present time. If so, the second question is whether a decree issued by a California court, amending the custody provisions of a final California decree of divorce, is binding and conclusive on the courts of Montana when made ten years after the mother and children, with the consent of the father and the California court, removed to Montana where they are and have been ever since resident and domiciled, and from whence the children have never returned to California.

STATEMENT

The petition in this case is for a writ of certiorari to review the judgment of the Supreme Court of Montana in an original proceeding instituted by writ of habeas corpus in that Court to obtain the custody of two minor children. The judgment of the Supreme Court was that "[t]he writ of habeas corpus issued in these proceedings is discharged without prejudice; and the children . . . are remanded to the custody of the respondent . . . ." (R. 128).

The Court preceded this judgment by stating:

> "But the courts of Montana are, nevertheless, themselves open to the father where, in the state of his children's domicil, he may be heard. Nothing said in this opinion is to be understood as foreclosing him from applying to the proper district court of this state for an order touching his children's custody. But upon this record in this court he is entitled to no relief." (R. 127-128).

The facts are simple. In 1944 the Superior Court of Los Angeles County, California, entered an interlocutory decree of divorce in respondent's action against petitioner. Both parties and their children were then domiciled and living in California and subject to the

jurisdiction of the Court. The decree included this paragraph:

> "IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff [Jean S. Enke] shall have the sole custody of the minor children, MAX SIEBEN ENKE, aged 2½ years, and KAREN JEAN ENKE, aged 3½ months, and the right to determine their place of residence, and that Defendant [Stephen Enke] shall have the right to correspond with the said children, and the right to visit them occasionally at the place of their residence at reasonable times and in reasonable manner after making arrangements with Plaintiff for such visits, and this court reserves the right to make appropriate orders for the support of the children." (R. 25).

This custody provision was taken from a separation agreement between the parties which recited the wife's intention to return to Montana—her father's home—with the children. In 1944, as contemplated, she returned to Montana with her children where they all have lived ever since, and are domiciled. In 1945 the Superior Court of California, on its own motion, entered a final decree of divorce adopting the terms of the interlocutory decree. Respondent remarried in 1947. She and the children live with her husband in Helena.

In October 1954, petitioner applied to the Superior Court at Los Angeles to modify the decree of 1944 by awarding him custody of the children during July of each year. Notice was given the mother by service upon her at Helena. She authorized an attorney to resist the application and through him submitted affidavits which were received in evidence at the hearing. Neither the mother nor the children appeared nor were present in California at the hearing. No service

was attempted upon the children. On November 23, 1954, the Superior Court granted petitioner's application and modified the 1944 decree accordingly. On July 2, 1955, on application of the father made to the Supreme Court of Montana (the highest court of that State), a writ of habeas corpus issued directed to the mother. After hearing upon the return to the writ, the Supreme Court discharged the writ without prejudice as stated above.

The Supreme Court did not pass upon the merits of the custody question. Jurisdiction to do so was in "the proper district court of this state," which the Supreme Court declared was open to petitioner. The Court held merely that the amendatory decree of the California Court, standing alone, was not sufficient to preclude the proper Montana court from considering the merits of the custody question. In so holding, it stands with the great weight of judicial authority.

REASONS FOR DENYING THE PETITION

1. By the nature of the action brought in Montana no federal question now exists

Petitioner claims that the California amended decree gives him legal custody of the children in July and makes illegal the mother's custody of them in that month. He does not claim that the mother's custody of them is illegal now or in any month except July. To obtain the release of the children from the alleged illegal custody of their mother he obtained on July 2nd this writ of habeas corpus. And he obtained it from and it was returnable to the Supreme Court. In such cases the law of Montana is laid down in *Ex parte Reinhardt,* 88 Mont. 282, 287, 292 Pac. 582, 584 (1930):

"... As was said by the Court in Child Savings Institute v. Knobel (Mo. App.) 29 S.W. (2d) 725: 'There are two kinds of writs of habeas corpus involving an infant. One is directed toward freeing the child from imprisonment and the other to exercise the powers of a court of general equity jurisdiction over the custody of the person of the infant.' Were this action one of the latter class, the district court would have original jurisdiction (section 11, art. 8, Montana Constitution), with the right of appeal to the supreme court (section 3, art. 8, Montana Constitution).

"It is only to free a person of imprisonment or restraint where the Supreme Court will exercise its original jurisdiction in habeas corpus, and it will not issue a writ of habeas corpus originally to exercise general equitable jurisdiction in awarding the custody of minors. . . ."

In the present case the Montana Supreme Court held that the California decree did not conclude the matter nor, of itself, render the mother's custody illegal; that Montana had a duty to perform in determining what was in the best interests of the children; and that the forum for this determination—to which the petitioner was invited to apply—was "the proper district court of Montana."[1] We believe, as is pointed out below, that this decision did not deny full faith and credit to the California decree under the decisions of this Court. But beyond that, a contrary view

[1] There is an abundance of precedent for an application by petitioner to a district court, by habeas corpus, for a determination on the merits. *E.g., Talbot* v. *Talbot,* 120 Mont. 167, 181 P. 2d 148 1947); *State ex rel. Nipp* v. *District Court,* 46 Mont. 425, 128 Pac. 590 (1912); *Giroux* v. *Giroux,* 19 Mont. 149, 47 Pac. 798 (1897). Questions involving changed circumstances were present in those cases. Evidence of this type is found here with respect to the period after amendment of the California decree in 1954 (R. 71-74, 80, 87-88).

would not make the mother's custody illegal at this time, which is the only question raised by the writ of habeas corpus in the Supreme Court of Montana. Furthermore, if petitioner wishes now to litigate the question of the proper custody of the children in July 1956, the proper court in Montana to consider and determine that matter is the district court. Perhaps he will still wish to argue that a decree entered in 1954 by a California court without jurisdiction over the children and without them present before it, is binding on the Montana district court in 1956, but that should be determined in a proceeding before a court with full jurisdiction to inquire into all the facts bearing on the welfare of the children and the merits of the custody issue.

In short, if this cause is returned to the Supreme Court of Montana, the only question before that Court will still be—are the children illegally restrained of their liberty. Since even on petitioner's view of the law they now are not illegally restrained, the writ must be discharged. The proper district court remains open to petitioner in which to present his claims for future custody.

2. The Montana decision does not deny full faith and credit under decisions of this court

Nothing has been the subject of more, or more confusing, judicial discussion than the effect of foreign judgments upon the determination of custody proceedings in respect of children of divorced parents. But here "words have been the chief trouble-makers."[2]

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[2] Stansbury, *Custody and Maintenance Law Across State Lines*, 10 Law & Contemp. Prob. 819, 826 (1944); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev. 345, 348 (1953).

Critical analysis of the holdings of the cases shows a clear enough preponderance of judicial decision in support of the result reached in this case.

At the outset certain principles are not in dispute. The first of these is that "[t]he minor child's domicil, in the case of divorce . . ., is that of the parent to whose custody it has been legally given. . . ."[3] In this case custody of the children was legally given to the mother, with knowledge that she was returning to Montana taking them with her. Her and their domicil is and has been in Montana, certainly since, with the entry of the final decree of divorce in 1945, all ties with California were cut. Furthermore, Montana was not merely the domicil of the children as a dry legal conception; it was where they actually lived in their established home.

Another principle is beyond dispute. "The state of domicil of the child can change the custody of the child from one parent to the other, or to or from both."[4] In accordance with this principle the Supreme Court of Montana declared that its "proper district court" was open to consider and determine any application regarding custody which the petitioner might bring to it. Surely, it cannot be plausibly argued that the State of Montana is without power and responsibility in regard to these children.

That, however, was the argument made to its Supreme Court—in effect, that Montana had no function to perform, could not consider in any way the welfare of these children-citizens, but must be the mere instru-

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[3] Restatement, *Conflict of Laws* § 32 (1934).

[4] Restatement, *Conflict of Laws* § 145 (1934).

mentality for carrying out the decree of a distant judge in Los Angeles.

The courts are understandably united in rejecting such a result in circumstances like those presented here, where the respondent has not wrongly removed the child from the jurisdiction of the foreign court, where the child was not before that court to be observed and questioned by the judge or his designee, and where the child has for years been both living and domiciled in the jurisdiction of the forum. The reasons given by the courts for their conclusions are not so uniform as the conclusions. In a large number, perhaps the largest number, of cases the reason given by the court of the domicil of the children is that the foreign court lacked jurisdiction;[5] another, and often alternative, ground is that circumstances have changed since the foreign decree was made;[6] still a third reason (the "Kansas" rule) is the duty of the court of the child's home, and with the child before it, to make an "independent" investigation.[7] In all of the cases it is plain, and often explicitly stated, that the predominant interest to be safeguarded, the consideration which at bottom controls the decision, is the welfare of the child and the best way of determining what it is.

In the present case the Montana Supreme Court concluded that California in 1954 did not have jurisdiction over the status of the children—although it assumed that California had jurisdiction over the par-

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[5] *E.g., Larson* v. *Larson*, 190 Minn. 489, 252 N.W. 329 (1934).

[6] *E.g., In re Svoboda's Guardianship*, 92 Cal. App. 2d 136, 206 P. 2d 672 (1949).

[7] *E.g., In re Bort*, 25 Kan. 308 (1881).

ents. Accordingly, the Montana Court found it was not bound by the California decision, dismissed the writ, and left petitioner to his remedy in the district court. We believe this holding was correct. But it does not follow that if the Montana Court had found otherwise—had concluded that California had had jurisdiction of a sort—the Montana Court would have erred had it, nevertheless, dismissed the writ and transferred the case to the district court with instructions to treat the petition as an application for custody during July of each year and determine that question on its merits.

In other words, the issue in this case does not turn on whether or not or to what extent the California Court "had jurisdiction" in 1954. Plainly enough the courts of Montana do have jurisdiction over the children and their status. Montana has a great interest in and responsibility for their welfare. The issue is whether, because of the Full Faith and Credit Clause, this jurisdiction, interest, and responsibility of Montana is frustrated and defeated by the action of the California Court which did not have the central figures in the whole controversy before it. All courts are agreed that the primary consideration in these cases is the welfare of the children, and yet in the California proceeding they are conspicuously absent, unheard, unseen, unexamined.

It is not denied, and cannot be, that—wholly apart from the issue of jurisdiction—the California Court in a new hearing with the children before it could amend its amendatory decree if upon examining them it concluded that a change in the custody provisions of the 1944 decree was not in their best interests. Indeed it would be its duty to do so. As a California Court

has stated (*Dotsch* v. *Grimes*, 75 Cal. App. 2d 418, 419-421, 171 P. 2d 506, 507 (1946)):

> "The child being within this jurisdiction, the courts of this state are empowered, notwithstanding any judgment or order of the courts of a sister state, to inquire into and determine in their own behalf what are the best interests and what will best promote the welfare of the child. This because under long-recognized authority in this State an award of custody of a minor child of divorced parents to either party in a divorce proceeding has no permanent finality, and is later subject to change and modification by the court wherein it was made. This rule is applicable not only to orders made by California courts, but to such former orders of courts in other states. . . . While . . . the court may not be held to have abused its discretion in refusing to modify or change the custody unless there is a showing of 'changed circumstances,' such a showing is not an essential prerequisite to the making of such modification if, in the exercise of its broad and sound discretion, the court, under the facts before it, determines that the best interests of the child would be conserved by modifying the previous order."

The Supreme Court of California has itself described the status of California decrees in other states in unexceptionable language (*Sampsell* v. *Superior Court*, 32 Cal. 2d 763, 779-780, 197 P. 2d 739, 750 (1948)):

> "The problem is not one of rendering custody decrees for the courts of other states to regard as final and conclusive determinations . . . . As a matter of comity the courts of this state treat valid custody decrees of the courts of sister states with the same respect as custody decrees of California courts. [Citing cases]. No more or less

respect for California decrees is expected from the courts of other states. If the decrees of California courts with respect to child custody are subject to modification and annulment in this state, they are likewise subject to modification and annulment in any state having jurisdiction over the subject matter, for such a decree 'has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where it was rendered.'" (Citing *Halvey* v. *Halvey,* 330 U.S. 610; and Harper, *The Supreme Court and the Conflict of Laws,* 47 Col. L. Rev. 883, 907-909 (1947)).

The language quoted by the California Court from this Court's opinion in *Halvey* v. *Halvey, supra,* occurred in this context (330 U.S. at 614):

"So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do.... But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. See *Reynolds* v. *Stockton,* 140 U.S. 254, 264. If the Court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause. See *Thompson* v. *Whitman,* 18 Wall. 457; *Griffin* v. *Griffin,* 327 U.S. 220. And if the amount payable under a decree —as in the case of a judgment for alimony—is discretionary with the court which rendered it, full faith and credit does not protect the judgment. *Sistare* v. *Sistare,* 218 U.S. 1, 17. Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (Cf. *Williams* v. *North Carolina,* 325 U.S. 226, 230), it is clear that the State of the forum has at least as much leeway to disre-

> gard the judgment, to qualify it, or to depart from it as does the State where it was rendered."

And as Mr. Justice Frankfurter (concurring) said in *May* v. *Anderson,* 345 U.S. 528, 536:

> ". . . Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children. There are, of course, adjudications other than those pertaining to children, as for instance decrees of alimony, which may not be definitive even in the decreeing State, let alone binding under the Full Faith and Credit Clause. Interests of a State other than its duty towards children may also prevail over the interest of national unity that underlies the Full Faith and Credit Clause. But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."

The Supreme Court of Montana has acted wholly in accordance with the Full Faith and Credit Clause and with the decisions of this Court in preserving the jurisdiction and responsibility of Montana courts to hear and determine this controversy in the best interests of children living and domiciled in Montana, and who were not before or within the power of the California Court.

Moreover, we believe that the rationale of the decision by the Montana Supreme Court is correct and that, since the California Court had no jurisdiction to enter the amendatory custody decree, no question of full faith and credit arises. The Montana Court's reasoning rests upon the legal principle that juris-

diction to determine the custody of minor children rests (except in temporary emergency situations) in the courts of the state of the children's domicil, and that jurisdiction over the parents only is not enough. The opinion of the Supreme Court of Montana refers to the leading cases. Comprehensive reviews of all the cases are contained in two excellent articles already cited.[8] That this is the law of California also is borne out, as the Montana opinion indicates, by the *Sampsell* case, *supra,* and is dramatically illustrated by *In re Chandler,* 36 Cal. App. 2d 583, 97 P. 2d 1048 (1940).[9]

As we understand petitioner's position, it does not contest the rule as above set forth. Rather, it adopts it, and insists that the California Court, having had jurisdiction over the children and their status in 1944,

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[8] Stansbury, *Custody and Maintenance Law Across State Lines,* 10 Law & Contemp. Prob. 819 (1944); Ehrenzweig, *Interstate Recognition of Custody Decrees.* 51 Mich. L. Rev. 345 (1953).

[9] There the father had been jailed for contempt by a California court for refusing to return his children from Texas, where he had sent them shortly before the mother sued for divorce in California. He was released on appeal and California was held lacking in jurisdiction—even though both parents were domiciled there—because the children were domiciled in Texas. The court reasoned in this manner: ". . . Where, as here, the domicile of the children was by the husband legally and lawfully changed from California to Texas . . . prior to the commencement of the divorce action, the court is without power to punish such husband for the doing of such legal and lawful act. With the father under commitment of confinement in jail until he returns the children from Texas, what an anomalous situation would arise if the courts of Texas in whose jurisdiction the children concededly now are should determine, as they have a right to do, in the exercise of such jurisdiction, that the best interests and welfare of the children would be served by their remaining in Texas . . . ." 36 Cal. App. at 585-586, 97 P. 2d at 1049. *Cf. Boens* v. *Bennett,* 20 Cal. App. 2d 477, 480-481, 67 P. 2d 715, 717 (1937).

has never lost it. But this argument does not prove petitioner's claim that the California decree must prevail in Montana where the children are admittedly domiciled and live now, and whose courts clearly have jurisdiction to determine issues of custody. At most it proves that both courts had jurisdiction, and that, as the Supreme Court of California has said in the *Sampsell* case, the California decision was not to be regarded as final and might be modified or set aside in a sister state also having jurisdiction.

But we think the sounder view, the one more in accord with the law of domicil, is that when the children's domicil was established in Montana, it ceased in California, and that, when it ceased, the California courts lost the power to determine issues of custody. It ceased, we believe, when all thought and intention of returning to California ended. And all thought and intention of returning to California ended when the Superior Court of California in 1945 entered its final decree and made the divorce of the parents absolute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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November 25, 1955

IN THE

Supreme Court of the United States

October Term, 1955

No. 488

IN THE MATTER OF THE APPLICATION ON BEHALF OF MAX SIEBEN ENKE AND KAREN JEAN ENKE FOR A WRIT OF HABEAS CORPUS

STEPHEN ENKE, *Petitioner,*

v.

JEAN S. BAUCUS, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

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REPLY

The bulk of respondent's Brief in Opposition is devoted to an argument that the Court below followed the better of several conflicting views upon the merits of the federal question involved (Opp. 6-14). Respondent's argument does not contradict or detract from the showing made by petitioner that a decision by this Court of the issue presented on the merits is clearly of such importance as to call for the exercise of the Court's certiorari jurisdiction. The substance

of this portion of the Opposition serves only to emphasize the appropriateness of review here.

This Reply is filed to discuss respondent's novel suggestion that this Court is powerless to review the denial of full faith and credit to the California judgment by the Montana Court in the present case, assuming that such a denial has occurred. Respondent's argument seems to be that since the only question before the Montana Court in this habeas corpus proceeding was the legality of respondent's custody of the children, and since the California decree awarded custody to petitioner only during the month of July, respondent's present restraint of the children in the month of November is not illegal and could not be ousted by any order this Court might enter on review—unless, presumably, the order of this Court reached the Supreme Court of Montana during July of the coming year, when respondent's restraint of the children would again be in violation of the California decree.

Respondent's theory of intermittent, on-and-off jurisdiction to review the decision below finds no support in the decisions of this Court, and respondent cites none.

In the usual habeas corpus proceeding it is true that a continuing restraint is not ordinarily legal and illegal by turns, and hence the entire controversy can be resolved in terms of the petitioner's immediate status. Therefore in the usual situation if the illegal restraint is terminated the controversy is at an end, and if an appellate court were to act thereafter it would be rendering an opinion and issuing an order which could not affect the litigants in the case before it.

This is obviously not true of the present case. The California judgment upon which petitioner relied did not grant petitioner legal custody of the children for the single month of July, 1954. The judgment provided a continuing division of legal custody between petitioner and respondent from the time of its entry until each of the children attains its majority, or until the further modification of the judgment by a court of competent jurisdiction.[1] Petitioner asked that this California judgment be given full faith and credit by the Montana Court. The Montana Court held that the California judgment "was ... void" (App. 5 a), that "it does not come within the protection of the full faith and credit clause of the Constitution of the United States," and that it "will accordingly be given no effect in Montana." (App. 13 a). The passage of the month of July, 1955, has not eliminated the basic legal controversy upon which the Montana Court ruled, or terminated the adverse effect of that judgment upon the rights of petitioner. The fact that respondent's custody of the children is at this moment a legal custody under the terms of the California decree, does not render moot or abstract in any sense the question of the propriety of the permanent denial of full faith and credit to that judgment by the Montana Court. The controversy over the entitlement of the California judgment to full faith and credit remains, and the judgment of this Court on review can effectively act upon it. Affirmance of the judgment below will confirm the legality of the restraint of the children by the respondent, not only during July, 1954, but in the future. Reversal will undo what the habeas corpus court did and make unlawful respondent's re-

[1] California Civil Code, Sec. 138.

straint of the children during future periods when petitioner is entitled to their custody by the terms of the California judgment.[2]

Unless the judgment below is reversed petitioner can assert no rights in any Montana Court under the California decree. The Supreme Court of Montana has pronounced that judgment void and decreed that it shall "be given no effect in Montana." The decision is binding upon all inferior Montana Courts. Unless it is reversed any future proceeding concerning the custody of these children which might be had in a Montana district court would necessarily proceed on the basis that the California judgment was void and of no effect. The issues litigated in California would be subject to re-litigation. The burden of proving that the original custody decree should be modified would again be imposed upon petitioner. The range of proof would again cover the entire period from the entry of that decree in 1944 to the date of the hearing. In sum, petitioner would be denied the benefit which he would have under the modified decree in California, of being secure in his right to custody of his children during one month of each year unless and until respondent were able to establish by preponderant proof in a proper proceeding that a change in the modified decree in this respect was made necessary by a change in circumstances occurring subsequent to its entry on November 23, 1954.[3]

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[2] Compare *Eagles* v. *United States*, 329 U. S. 304, 307-308.

[3] The general rule in both California and Montana is that a custody decree is subject to change only upon proof of a change of circumstances which renders the modification necessary in the interest of the child. The rule is subject to a strictly limited exeption based upon such special circumstances as a showing that per-

Here and elsewhere in the Opposition, respondent's counsel have woven through their argument the suggestion that a hearing should be held in a Montana Court on the merits of the question as to whether the interests of the children would be served by placing them in the custody of their father for one month a year. Since the Supreme Court of Montana is said to lack the power to hold such a hearing on the merits, respondent in effect suggests that this Court should, by declining certiorari, permit the Montana Court to deny full faith and credit to the California judgment in order to force petitioner either to abandon his children or initiate a new custody proceeding in a Montana district court where the merits may be re-litigated.

The suggestion is premised upon an attitude of insularity and distrust of the judicial acts of a sister State which the full faith and credit clause was intended to eliminate in the interest of national unity. A duly constituted California Court has reached a determination with respect to the needs of these children after a hearing in which both respondent and petitioner were represented and presented the evidence which they thought relevant. There is no basis for the implication that this judicial act does not reflect what is truly in the children's interests. It is entitled to respect and recognition under the Constitution, unless and until it is properly superseded by an appro-

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tinent facts were unknown to the party seeking the change at the time the original decree was entered. The modification decree in the present case was based upon an express finding that a change of circumstances had occurred which required the modification of the decree which was thereupon ordered by the California Court. (R. 27-28).

priate exercise of judicial authority by the same or another proper Court.

Respectfully submitted,

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